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S.C. SUPREME COURT

November 20, 2019

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc.,

Public Service Commission Docket No: 2018-318-E

Dear Mr. Shearouse:

Enclosed for filing on behalf of the South Carolina Office of Regulatory Staff ("ORS"), please find a Notice of Cross-Appeal in the above-referenced matter.

The ORS is a state agency having been created by the South Carolina General Assembly with the enactment of Act 175 of 2004. As the ORS is a state agency, I have not included a filing fee in reliance on Rule 203(d)(2)(B), SCACR.

By copy of this letter and as certified in the Proof of Service appended to the Notice, I am serving counsel for Appellant and other attorneys/parties of record. In addition, I would appreciate the extra copy being clocked in and returned by our courier.

If additional information is needed or if there are any questions regarding this request, please do not hesitate to contact me.

Sincerely,

Chris Huber

Christopher M. Huber

Enclosures

cc: Honorable Jocelyn G. Boyd
All Parties of Record (via U.S. Mail)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Public Service Commission Docket No. 2018-318-E

Duke Energy Progress, LLC, Appellant-Respondent,

v.

Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc., Respondents,

Of whom Office of Regulatory Staff is Respondent-Appellant.

NOTICE OF APPEAL

The South Carolina Office of Regulatory Staff ("ORS") cross-appeals the Decisions and Orders of the Public Service Commission dated May 21, 2019 (Order No. 2019-341), dated July 31, 2019 (Order No. 2019-545), and the order on motions for rehearing and reconsideration dated October 18, 2019 (Order No. 2019-454). Copies of these orders are attached to this notice. ORS received Duke Energy Progress, LLC's Notice of Appeal of the above-referenced orders on November 15, 2019.

Because the orders set a public utility rate under Title 58 of the South Carolina Code, this appeal is filed in the South Carolina Supreme Court, pursuant to Rule 203(d)(2), SCACR.

SIGNATURE ON THE FOLLOWING PAGE

Respectfully Submitted,

Chri Huber

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November 20, 2019

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BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2018-318-E – ORDER NO. 2019-341

MAY 21, 2019

IN RE:	Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs	)))	**ORDER**

I. EXECUTIVE SUMMARY

In the interest of transparency, and to provide a condensed explanation of our reasoning with respect to certain significant components of this Order, we offer the following Executive Summary of issues that have the greatest dollar impact on customer rates and that have otherwise attracted significant public interest.

Return on Equity

The substantial evidence on the whole record supports, and we are persuaded that a 9.50 percent return on equity ("ROE") is just and reasonable in this proceeding. We conclude that Office of Regulatory Staff ("ORS") witness David Parcell presented sound analysis as to the appropriate ROE, a recommended range of 9.1 – 9.5. The evidence in this proceeding shows that Duke Energy Progress, LLC ("DEP") witness Robert Hevert's ROE analyses relied on inputs that systematically elevated his estimated ROE. This finding is supported by evidence and testimony from the hearings regarding ROEs approved in neighboring jurisdictions for utilities with similar risk profiles; downward national ROE trends; and DEP's very strong credit ratings and financial soundness. Unless clearly justified, which in this case it was not, DEP's South Carolina customers should not pay rates incorporating a ROE that exceeds the national average for vertically integrated utilities.

Coal Ash Expenses

We conclude that coal ash-related costs incurred solely as a result of North Carolina's Coal Ash Management Act ("CAMA") law shall not be recoverable from DEP's South Carolina customers at this time. However, should our General Assembly or the federal government enact laws that impose costs currently only imposed by North Carolina's CAMA, DEP is not prohibited from seeking recovery of such costs which, at present, we disallow.

Deferred Costs

The Company has deferred costs relating to GridSouth, Fukushima and cybersecurity, and Harris COLA that it seeks to recover in this proceeding. The Commission concludes that the Company is entitled to a "return of" the deferred costs which it seeks to recover, but only a "return on" capital-related expenses. This conclusion is consistent with the principal of using a historic Test Year, established principles of regulatory accounting regarding the treatment of capital versus operating expenses, and the fact that customers did not receive notice of the possible impact of deferrals. An administrative docket on the creation and treatment of deferrals shall be established subsequent to the issuance of this Order.

II. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the "Commission" or "PSC") on the Application of Duke Energy Progress, LLC ("DEP" or the "Company") filed November 8, 2018 (the "Application") requesting authority to adjust and increase its electric rates, charges, and tariffs. The Application was filed pursuant to S.C. Code Ann. §§ 58-27-820 and 58-27-870 and S.C. Code Ann. Regs. 103-303 and 103-823.

Contemporaneous with its Application, on November 8, 2018, the Company filed the Direct Testimony of Laura D. Bateman, Director of Rates and Regulatory Planning for Duke Energy Carolinas, LLC ("DEC") testifying on behalf of DEP; David L. Doss Jr., Director of Electric Utilities and Infrastructure Accounting for Duke Energy Business Services ("DEBS");[1] Kodwo Ghartey-Tagoe, State President – South Carolina for DEP and DEC; Janice Hager, President of Janice Hager Consulting, LLC; Kelvin Henderson, Senior Vice President of Nuclear Operations;

[1] DEBS provides various administrative and other services to DEP and other affiliated companies of Duke Energy.

In its Application, the Company requested a revenue increase of approximately $69 million with approximately a $10 million offset to be implemented with a rate rider[3] and a ROE of 10.50 percent.

On November 26, 2018, the Commission Clerk's Office issued the Notice of Filing and Hearing and instructed the Company to publish it in newspapers of general circulation in the areas affected by the Company's Application by December 6, 2018, to notify each affected customer of the hearing by December 6, 2018, and to provide a certification to the Commission by December 27, 2018. On November 27, 2018, the Company filed a letter requesting additional time to complete the notification to customers. On November 28, 2018, the Commission's Clerk's Office issued a Revised Notice of Filing and Hearing and instructed the Company to publish it in newspapers of general circulation in the areas affected by the Company's Application by December 6, 2018, and to provide proof of publication by December 27, 2018. The Revised Notice of Filing and Hearing indicated the revenue being requested by the Company, the overall bill impact to residential customers if the Company's request was granted and referenced the Company's Application. The Revised Notice of Filing and Hearing also advised those desiring to participate in the proceeding, scheduled to begin April 11, 2019, of the manner and time in which to file appropriate pleadings. The Commission also required the Company to notify each affected customer of the hearing by January 11, 2019 and provide a certification to the Commission by February 1, 2019. On December 27, 2018, the Company filed affidavits with the Commission demonstrating that the Revised Notice was duly published in accordance with the

[3] The net annual revenue increase includes the impact of the return of deferred income taxes through the excess deferred income tax rider ("EDIT Rider") of approximately $9,977,484, as further discussed below.

("SCEUC") represented by Scott Elliott, Esquire, filed a petition to intervene on January 28, 2019. Sierra Club, represented by Robert Guild, Esquire and Bridget Lee, Esquire, filed a petition to intervene on January 28, 2019. The South Carolina State Conference of the National Association for the Advancement of Colored People ("NAACP"), South Carolina Coastal Conservation League ("CCL"), and Upstate Forever (collectively, "SC NAACP, et al."), represented by Stinson Woodward Ferguson, Esquire; David L. Neal, Esquire; and Gudrun E. Thompson, Esquire, filed a petition to intervene on February 1, 2019. The Office of Regulatory Staff ("ORS"), automatically a party pursuant to S.C. Code Ann. § 58-4-10(B), was represented by Nanette S. Edwards, Esquire, Andrew M. Bateman, Esquire, and Alexander W. Knowles, Esquire. DEP was represented by Heather Shirley Smith, Esquire; John T. Burnett, Esquire; Camal O. Robinson, Esquire; Frank R. Ellerbe, III, Esquire; Brandon F. Marzo, Esquire; Molly McIntosh Jagannathan, Esquire; and Len S. Anthony, Esquire. Collectively, DEP, Walmart, Vote Solar, SBA, SCEUC, Cypress, Sierra Club, SC NAACP, et al, and ORS are referred to as the "Parties" or individually as a "Party."[4]

On March 1, 2019 SBA filed the Direct Testimony and Exhibits of Hamilton Davis, Director of Regulatory Affairs for Southern Current, LLC, and Christopher Villarreal, President of Plugged In Strategies.

On March 4, 2019, ORS filed the Direct Testimony of Sarah W. Johnson, Deputy Director of Utility Services for ORS; Kelvin L. Major, Audit Manager for ORS; Willie J. Morgan, P.E., Deputy Director of the Utility Rates Department for ORS; David C. Parcell, Principal and

[4] The South Carolina Department of Consumer Affairs ("Consumer Affairs"), represented by Becky Dover, Esquire and Carri Grube-Lybarker, Esquire, was provided notice pursuant S.C. Code Ann. § 37-6-604(C), but did not elect to participate.

Cypress filed letters in support of ORS's motion.[5] On March 14, 2019, ORS and DEP filed a Stipulation ("GIP Stipulation") agreeing that the GIP shall be considered in a separate docket independent from the Application. The Company agreed to withdraw from Commission consideration the GIP and the associated cost recovery proposal for costs incurred related to plant placed in service on or after January 1, 2019. Pursuant to the GIP Stipulation, all testimony and evidence relating to the GIP may be moved to the new docket, and all Parties who have expressed any position on the GIP shall automatically be granted intervenor status in the new docket. ORS and the Company further agreed that DEP may defer into a regulatory asset account all GIP-related costs until the underlying costs and proposed recovery are considered in a general rate case proceeding. On March 13, 2019, the Standing Hearing Officer approved the GIP Stipulation pursuant to Order No. 2019-26H.

On March 18, 2019, the Company filed the Rebuttal Testimony of witnesses Bateman, Ghartey-Tagoe, Hager, Henderson, Hevert, Hunsicker, Kerin, Panizza, Schneider, Turner, Sullivan, Wheeler, and Wright. The Company also filed the Rebuttal Testimony of Barbara A. Coppola, Manager, Grid Solutions and Strategy with DEBS; Renee Metzler, Managing Director – Retirement and Health and Welfare with DEBS; Lesley Quick, Vice President, Revenue Services for Duke Energy Corporation ("Duke Energy"); and John J. Spanos, President of Gannett Fleming Valuation and Rate Consultants, LLC. Exhibits were included with the Rebuttal Testimony of witnesses Bateman, Hevert, and Sullivan.

[5] Vote Solar, Nucor, SCEUC, SC NAACP, et al., and Walmart voiced their support for ORS's motion via E-mail, which was posted to the Docket Management System on March 11, 2019.

regarding the Company's proposal. This Commission heard from about 45 customers who testified about the impacts of DEP's requests in its Application.

On March 29, 2019, DEP filed a Stipulation[8] between the Company and Nucor ("Nucor Stipulation,") along with the Stipulation Testimony of DEP witness Wheeler. Under the terms of the Nucor Stipulation, Nucor withdrew the Direct Testimony of its witnesses and DEP withdrew its Rebuttal Testimony and refiled[9] after removing all references to Nucor's issues. DEP also filed the Second Supplemental Testimony of witness Bateman on April 1, 2019, in support of the Nucor Stipulation.

On April 8, 2019, ORS and DEP reached an agreement regarding DEP's proposed Prepaid Advantage Program Pilot ("Prepaid Pilot") and filed a Stipulation ("Prepaid Pilot Stipulation").[10] Pursuant to the Prepaid Pilot Stipulation, DEP withdrew its request for consideration of the Prepaid Pilot in this Docket, with the option to open a separate docket in the future and transfer all testimony and exhibits from this Docket.

On April 10, 2019, Hearing Officer Dong excused SBA witnesses Villareal and Davis. Pursuant to the GIP Stipulation, the testimony of witnesses Villareal and Davis will be moved into the appropriate new docket once created. Counsel for SBA was also excused from appearing at the hearing in this Docket.

Also, on April 10, 2019, ORS filed a stipulation between it and DEP whereby DEP agreed to withdraw from Commission consideration its proposed Pre-Paid Advantage Pilot Program.

[8]See Duke Energy Progress, LLC and Nucor Steel – South Carolina Stipulation https://dms.psc.sc.gov/Attachments/Matter/b950f8d4-b530-48a9-8e8b-e37dea8e3cc5

[9]DEP filed the redlined and clean versions of the Rebuttal Testimony of witnesses Bateman, Gartey-Tagoe, Henderson, Hevert, and Sullivan.

[10]See Stipulation https://dms.psc.sc.gov/Attachments/Matter/b5733e73-44fa-41bc-ab80-d7762186b543

customers. Witness Hunsicker discussed the need for modernization of DEP's current Customer Information System ("CIS") into Customer Connect. Witness Hunsicker also responded to ORS witness Payne's recommendation to disallow the projected two-year average operation and maintenance ("O&M") expense.

The Commission reconvened on April 12, 2019, with the conclusion of DEP's panel of witnesses Schneider, Quick, and Hunsicker. The Company then presented witness Panizza who addressed the Tax Cuts and Jobs Act ("TCJA") and its impact on DEP's customers. Witnesses Turner and Henderson testified as the next panel for DEP. Witness Turner described the Company's fossil, hydroelectricity, and solar generation assets, provided updates on the Company's capital additions, and explained the key drivers impacting O&M costs. Witness Turner also responded to Sierra Club witness Hausman regarding the recovery of costs for the dry bottom ash system. Witness Henderson described DEP's nuclear generation assets, DEP's capital additions since its last rate case and upcoming capital additions and provided operational performance results. Witness Henderson responded to ORS witness Morgan's recommendations to remove the Company's request to adjust depreciation and amortization expenses to establish a reserve for end of life nuclear costs and to exclude nuclear inventory from rate base. Upon agreement by the Parties, DEP stipulated into the record the testimonies of witnesses Doss, Ward, and Oliver. Witness Metzler testified next in response to ORS witness Major's recommendations to remove 50 percent of the Company's long and short-term incentive program costs. DEP presented its next panel of Witnesses Hager and Wheeler. Witness Hager testified to the allocation of DEP's operating revenues and expenses and the Company's cost of service study ("COSS"). Witness Wheeler explained DEP's proposed rates and charges and the impacts on customers, and responded to intervenor testimony regarding BFCs, rate design, real time pricing, and the refund related to coal ash disposal expenses and testified to the Company's actions. Witness Coppola testified in response to ORS witness Morgan's testimony regarding the beneficial reuse contract the Company entered into with CertainTEED Gypsum NC, Inc. and the ensuing litigation fees and settlement payments. DEP then presented its final panel of witnesses, Sullivan and Hevert. Witness Sullivan addressed DEP's financial objectives, capital structure, cost of capital, cost of debt, and the Company's upcoming capital needs. Witness Hevert recommended an ROE of 10.75 percent. The methodology he used recommended a range of 10.25 percent to 11 percent.

Witness Chriss testified on behalf of Walmart regarding the Company's proposed increase to the revenue requirement and ROE, the impact those proposals would have on customers and what the national ROE trends are for vertically-integrated electric utilities. SCEUC witness O'Donnell testified regarding DEP's cost to South Carolina manufacturers, DEP's costs related to coal ash disposal and remediation, and DEP's real time pricing rates.

The Commission reconvened on April 16, 2019, with an appearance from John Bowen, Jr., Esquire, who spoke on behalf of the South Carolina Farm Bureau ("Farm Bureau") regarding comments made at the public night hearings and a letter filed in this Docket on April 9, 2019. Mr. Bowen updated the Commission on the ongoing collaborative efforts made by DEP to resolve some of the Farm Bureau's concerns.

ORS stipulated into the record the testimonies of witnesses Sandonato and Schellinger. The testimony of ORS witness Schellinger recommended the Commission authorize a rate reduction of $9,977,484 million due to the TCJA to be flowed back to customers in the same manner proposed by DEP. Anthony Sandonato testified regarding the Company's Grid Improvement Plan, consideration of which has been dismissed from this proceeding.

them on several adjustments. On April 17, 2019, ORS filed a Stipulation[12] ("Adjustments Stipulation") stating ORS and DEP had reached agreements on the following adjustments: #20[13] (Normalization of Storm Costs); #28 (Credit Card Fees); #25 (Rate Case Expenses); #15 (End-of-Life Nuclear Reserve); #39 (Nuclear Materials and Supplies); and #21 (Adjustment to Non-Labor O&M).

The hearing reconvened on April 17, 2019, with ORS presenting its final panel of witnesses Morgan and Hamm. Witness Morgan testified regarding ORS's recommendations regarding certain pro forma adjustments concerning DEP's proposed end of life nuclear fund, the deferred cost balance related to SC AMI, storm costs, legal expenses, ongoing payment obligations with CertainTEED Gypsum NC, Inc., and adjustment for nuclear materials and supplies inventory. Witness Hamm testified regarding ORS's recommendation to disallow certain legal expenses, asserting that the Company failed to meet its legal and operations obligations and its burden of proof that the expenses incurred are both fair and reasonable.

The Parties submitted proposed orders and legal briefs on May 1, 2019.

III. STATUTORY STANDARDS AND REQUIRED FINDINGS

The evidence supporting DEP's business and legal status is contained in its Application filed by Applicant, testimony, and in prior Commission Orders in the docket files of the Commission, of which the Commission takes judicial notice. DEP is (1) a limited liability company duly organized and existing under the laws of the State of North Carolina; (2) duly authorized by its Articles of Organization to engage in the business of generating, transmitting,

[12] A Revised Stipulation was also filed removing the reference to an Exhibit 1. See Revised Stipulation https://dms.psc.sc.gov/Attachments/Matter/7e05ccd9-1532-4d1f-9c63-ce9450552d1d
[13] In the Adjustments Stipulation this adjustment is improperly referred to as #22, however the title "Normalization of Storm Costs," is correct.

Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602-03(1944) ("*Hope*") and *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93 (1923) ("*Bluefield*").

Bluefield holds that:

> What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting the opportunities for investment, the money market and business conditions generally. *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. at 692-93.

This Commission and the South Carolina courts have consistently applied the principles set forth in *Bluefield* and *Hope*. *Southern Bell Tel. &Tel. Co. v. Pub. Serv. Comm'n,* 270 S.C. 590 (1978). Quoting *Hope*, the South Carolina Supreme Court held:

> ...Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling...The ratemaking process under the Act, i.e., the fixing of 'just and reasonable' rates, involves the balancing of investor and the consumer interests. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03(1944).

(internal citations omitted). However, according to *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff,* 392 S.C. 96, 110, 708 S.E.2d 755, 762–63 (2011) "...[I]f an investigation initiated by ORS or by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures."

The object of using test year figures is to reflect typical conditions. The company has the benefit of choosing its test year. Where an unusual situation indicates that the test year figures are atypical, the Commission should adjust the test year data. *Parker v. S.C. Pub. Serv. Comm'n,* 280 S.C. 310, 312, 313 S.E.2d 290, 292 (1984). The Commission must make adjustments for known and measurable changes in expenses, revenues, and investments so that the resulting rates will accurately and truly reflect the actual rate base, net operating income, and cost of capital. *Southern Bell,* 270 S.C. at 602–03, 244 S.E.2d at 284–85.

The Commission's Findings of Facts and Conclusions reflect these standards.

IV. REVIEW OF THE EVIDENCE AND EVIDENTIARY CONCLUSIONS

A. Cost of Capital

Return on Equity

ORS's Position

ORS witness Parcell testified that he has provided testimony as a ROE and Cost of Capital expert witness on several occasions before this Commission since the early 1980s. (R. p. 801-2, ll. 4-6). He further stated that he has testified in over 570 utility proceedings in approximately 50 regulatory agencies across the United States and Canada. (R. p. 801-1, ll. 21-22, p. 801-2, l. 1).

According to Mr. Parcell, public utility rates are normally established in a manner designed to allow the recovery of their costs, including capital costs. (R. p. 801-4, ll. 14-15). Utilities are

25). While Mr. Parcell did not directly employ a RP model in his analyses, his CAPM analysis is a form of the RP methodology. (R. 801-8, ll. 25-27).

Mr. Parcell performed independent studies and made recommendations of the current cost of equity capital for DEP and because DEP is a subsidiary of Duke Energy Corporation, he also evaluated this entity in his analyses. (R. p. 801-2, ll. 10-12). Mr. Parcell's overall cost of capital recommendations for DEP is shown on Schedule 1 and are summarized as follows:

	Percent	Cost	Return
Long-Term Debt	47.00%	4.16%	1.96%
Common Equity	53.00%	9.10-9.50%	4.82-5.04%
Total	100.00%		6.78-7.00%

(R. p. 797, ll. 13-19, p. 801, l. 1).

Mr. Parcell recommended as reasonable a range of ROE from 9.10% - 9.50% and a cost of capital of 6.84 percent. Within the range recommended by Mr. Parcell, he testified that he thought a 9.30 percent return on equity was appropriate. (R. p. 801-3, l. 1)

According to Mr. Parcell, the first step in performing his analyses was to develop the appropriate capital structure. (R. p. 801-3, ll. 6-7). DEP proposed a hypothetical capital structure with 47 percent long-term debt and 53 percent common equity, which DEP witness Sullivan describes as the "optimal" capital structure for the Company. (R. p. 801-3, ll. 7-10). Mr. Parcell also used this capital structure. (R. p. 801-3, l. 10) The second step in a cost of capital calculation is to determine the embedded cost rate of debt. (R. p. 801-3, ll. 11-12). DEP and Mr. Parcell proposed to use a cost rate of 4.16 percent for long-term debt, the rate as of December 31, 2018. (R. p. 803-17, ll. 11-12). The third step in the cost of capital calculation is to estimate the cost of percent recommended ROE – and by necessity, his range of 9.10 – 9.50 percent ROE - and Mr. Hevert's 10.75 percent ROE recommendation are as follows:

1. Mr. Hevert only considered a single source of "growth," earnings per share ("EPS") forecasts in his single-stage DCF. In contrast, witness Parcell considered several indicators of growth estimates. In his multi-stage DCF, Mr. Hevert focused on historic measures of GDP growth, which is inconsistent with his refusal to consider historic growth in his single-stage DCF. (R. p. 799, ll. 1-13).
2. With respect to the CAPM method, Mr. Hevert used interest rate projections as the risk-free rate whereas witness Parcell used current interest rates. It is noteworthy that Mr. Hevert's risk premium measure greatly exceeded the historic level of risk premiums. (R. p. 799, ll. 14-19).
3. As for the CE method, Mr. Hevert did not employ a CE analysis as part of his testimony, whereas witness Parcell did. This third method of analyzing an appropriate ROE for DEC considered the opportunity cost of capital investment. (R. p. 799, ll. 19-24).

According to Mr. Parcell, at 10.75 percent would exceed every ROE award in the continental U.S. since at least 2016. (R. p. 800, ll. 1-4). Witness Parcell testified that one impact of the Great Recession has been a reduction in actual and expected investment returns and a corresponding reduction in capital costs. (R. p. 801-11, ll. 15-16). Regulatory agencies throughout the U.S. have recognized the decline in capital costs by authorizing lower ROEs for regulated utilities in each of the last several years.[15] (R. p. 801-11, ll. 19-20).

[15] Mr. Parcell cited "Regulatory Research Associates, 'Regulatory Focus.' January 31, 2019."

model; (2) the CAPM; and (3) the Bond Yield Plus Risk Premium approach. (Direct, p. 5, ll. 6-9). Witness Hevert testified regarding the capital market environment and addressed the effect those market conditions have on the return investors require in order to commit their capital to equity securities. According to witness Hevert, the TCJA has increased cash flow-related risks for utilities and the recommends the Commission consider the capital market implications of the TCJA as part of its review. (Direct, p. 78, ll. 15-16, p. 79, ll. 7-10). Accordingly, witness Hevert recommended that the Commission "focus on the upper end of the range of analytical results." (Direct, p. 79, ll. 5-6). Based upon his analysis, witness Hevert testified that the Company's ROE was in the range of 10.25 percent-11.00 percent. (Direct, p. 80, ll. 9-10). Witness Hevert testified that his conclusion considered the current capital market environment, including the TCJA, as well as the Company's risk profile relative to the proxy group analytical results with respect to (1) the risks associated with certain aspects of the Company's generation portfolio; (2) the Company's significant capital expenditure plan; (3) the risk associated with severe weather; (4) the risk associated with the Company's regulatory environment; and (5) the cost of issuing common stock. (Direct, p. 81, ll. 3-9).

According to DEP witness Ghartey-Tagoe, the Company is proposing rates be set on a ROE of 10.50 percent as a rate mitigation measure. (R. p. 298-15, ll. 17-22).

According to DEP witness Sullivan, the Company supports witness Hevert's testimony and analysis; however, to mitigate rates, DEP requests a ROE of 10.5 percent. (Direct, p. 5, ll. 21-23, p. 6, l. 1; *See Also* Application of Duke Energy Progress, LLC, Para. 24 (Nov. 8, 2018).

Furthermore, witness Chriss testified that in the group reported by SNL Financial, the national average ROE for vertically integrated utilities authorized by state regulatory commissions from 2016 to date is 9.76 percent and overall, the average annual authorized ROE has been trending downward. (Direct, p. 11, ll. 5-7). According to witness Chriss, the average ROE authorized for vertically integrated utilities in 2016 was 9.77 percent, in 2017 it was 9.80 percent, and since the beginning of 2018 it has averaged 9.69 percent. (Direct, p. 11, ll. 7-9). Finally, witness Chriss testified that a 10.50 percent ROE would be the third highest approved ROE for a vertically integrated utility at any time since 2016 if adopted by the Commission. (Direct, p. 11, ll. 11-13).

Commission's Finding

In *Bluefield*, the Supreme Court of the United States outlined the constitutional standards for determining an appropriate rate of return. These standards govern this Commission's determination of an appropriate ROE:

> A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit, and enable it to raise the money necessary for the proper discharge of its public duties.

Bluefield, 262 U.S. at 692, as quoted in *Southern Bell*, 244 S.E. 2d at 281.

In *Hope*, the Court reaffirmed these principles holding:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.... By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be

carefully evaluated the evidence submitted in this case as to what ROE DEP should be authorized the opportunity to earn.

Determining a proper ROE is both an art and a science. (R. p. 345, ll. 18-20). In evaluating an appropriate ROE, the Commission must not base the approved ROE exclusively on a comparative analysis; however, it may look at businesses in this part of the country with similar risks and uncertainties as those that attend DEP. DEP witness Hevert testified that since 2014, ROEs for vertically integrated electric utilities authorized in Florida, Mississippi, North Carolina, South Carolina, Tennessee and Georgia ranged from 9.85 percent to 10.55 percent, with an average of 10.10 percent. (Rebuttal, p. 12, n. 5). Additionally, according to DEP witness Hevert, average authorized ROEs of across the 71 vertically integrated utilities for which Regulatory Research Associates reports ranged from 9.62 percent to 9.95 percent since 2016. (Rebuttal, p. 100, l. 1). According to Walmart witness Chriss, the average ROE for vertically integrated utilities authorized from 2016 through present is 9.76 percent and has been trending downward. (Direct, p. 11, ll. 5-7). ORS witness Parcell testified that average ROEs authorized by state regulatory agencies have declined and continue to remain relatively low through 2018, with the average electric ROE in 2018 being 9.56 percent. (Direct, p. 15, ll. 10).

The Commission also considered the relative risk of DEP. While both DEP witness Hevert and ORS witness Parcell utilized methodologies in their analyses that account for risk, witnesses also explicitly testified regarding DEP's riskiness. According to ORS witness Parcell, DEP has the highest senior unsecured ratings among the Duke Energy utility subsidiaries, except for DEC. (Direct, p. 18, ll. 2-3). Additionally, DEP's higher ratings are indicative of relatively lower risk. (Parcell Direct, p. 18, ll. 10). DEP witness Hevert testified that DEP's capital-intensive projects witness Parcell evidenced his efforts to produce a fair and reasonable recommendation to the Commission. Conversely, DEP witness Hevert recommended that both of his DCF analyses be given little weight by the Commission, due to their yielding results which he believed to be too low. (Rebuttal, p. 8, ll. 1-3). Thus, Mr. Parcell attempted to be unbiased by discounting his CAPM results, which he judged to be too low, and Mr. Hevert chose to discount two (2) methodologies that he also claimed to be too low, thus aiding in his production and recommendation of an inequitably high ROE.

Mr. Parcell provided evidence that, from 2017 to 2018, ROEs allowed by regulatory jurisdictions across the country for all electric utilities averaged 9.59 percent with a median ROE of 9.58 percent. (Parcell Direct, p. 70, DCP-2, Schedule 3). This national average is only 9 basis points higher than Mr. Parcell's recommended range, but 116 basis points lower than Mr. Hevert's recommended 10.75 percent ROE. Testimony and supporting materials submitted to the Commission confirmed a decline in ROEs across the country in recent years, supports the strength of market conditions, and indicates anticipated upward trend in interest rates in the near term. The above facts make it clear that Mr. Hevert's ROE recommendation is less credible than the ROE range recommended by Mr. Parcell. South Carolina customers should not pay rates that are based on a ROE higher than the national average.

After consideration of the substantial evidence on the whole record, the Commission concludes that it is not fair and reasonable or a fair balancing of the interests of the Company and its customers to approve a ROE of 10.75 percent or 10.50 percent.[20] While a public utility is

[20] The Commission notes that DEP witness Hevert's proposed ROE of 10.75% would be the highest authorized ROE approved in the continental U.S. over the past 8 years. (Parcell Surrebuttal, p. 6, ll. 3-7).

Cost of Debt

ORS's Position

In determining the cost of debt, witness Parcell utilized 4.16 percent, which reflects the actual cost of debt for DEP. (R. p. 803-4, ll. 9-11). ORS witness Parcell accepted the Company's revision to update the cost of long-term debt as of December 31, 2018. (R. p. 803-17, ll. 11-12).

DEP's Position

DEP witness Sullivan testified that he recommends using DEP's updated 4.16 percent cost of debt, calculated as of December 31, 2018. (Revised Rebuttal, p. 3, ll. 1-2).

Walmart's Position

In witness Chriss' direct testimony, which occurred prior to the update of DEP's cost of debt, he testified that the Company proposed a cost of debt of 4.06 percent in its Application. (Direct, p. 6, ll. 18-20).

Commission Finding

Regarding the Commission's finding on this issue – as well as issues addressed elsewhere in this order – South Carolina law requires "[t]he determination of a fair rate of return must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record." *Porter v. S.C. Public Service Commission*, 332 19 S.C. 93, 98, 504 S.E.2d 320, 323 (1998), citing S.C. Code Ann. § 58-5-240 (Supp. 2003). In making its decision, this Commission cannot make a determination based upon surmise, conjecture or speculation. *See Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 143 S.E.2d 376 (1965). Finally, South Carolina law states that opinion testimony, without an underlying showing of the evidentiary

Table 1: Summary of Overall Rate of Return

Type of Capital	Ratios	Cost Rate	Weighted Cost Rate
Long-Term Debt	47.00%	4.16%	1.96%
Common Equity	53.00%	9.50%	5.04%
Total	100.00%		6.99%

B. Recovery of Coal Ash Expense

ORS's Position

Regarding DEP's requested recovery of expenses related to coal ash, ORS presented the testimonies of Dan Wittliff and Michael Seaman-Huynh. Mr. Wittliff testified to the evolution of coal ash management regulations in order to provide context for the development of the federal CCR rules and the North Carolina CAMA. (R. p. 1115-8, ll. 13-16). According to Mr. Wittliff, the unpermitted discharge of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River, which occurred through two pipes from Dan River's primary coal ash basin, played a deciding role in the development of North Carolina's CAMA in its present form, not only accelerating the timing of action required, but also limiting the options to remediate and close coal combustion residuals impoundments more than would eventually occur under the CCR Rule. (R. p. 1115-15, ll. 13-23). Witness Wittliff testified that, in addition to language contained within North Carolina's CAMA and legislative drafts of what eventually became CAMA, the court cases and subsequent plea agreements (see Hearing Exhibit No. 59, Wittliff Direct Exhibits DJW-5.1 – DJW-5.4) demonstrate that DEC and DEP were criminally and civilly negligent in their operations and maintenance of the impoundments for years

3. Expenditures for actions that would not have been required at this time under the federal CCR rule but are subject to accelerated schedules under North Carolina's CAMA or other state law (Sutton and Asheville fall into this category).

(R. p. 1115-30, ll. 8-12, p. 31, ll. 11-18).

According to witness Wittliff, ORS has taken the position that North Carolina laws, over which DEP's South Carolina customers have no meaningful input, should not place an additional burden on the ratepayers of South Carolina. (R. p. 1115-31, ll. 2-6).

Regarding costs incurred at the DEP plant H.F. Lee, witness Wittliff testified that DEP's beneficiation project at H.F. Lee falls under the "CAMA-only" category, and the ratepayers of South Carolina should not have to reimburse the Company for expenses related to North Carolina's CAMA-only beneficiation requirement. (R. p. 1115-36, ll. 1-4). Witness Wittliff testified that, as a result of his December 2018 site visit to H.F. Lee, he learned that the beneficiation plants are to be built and commissioned between 2019 and 2021 and out of spec ash will be landfilled off-site and qualifying ash will largely be sold to concrete plants. (R. p. 1115-36, ll. 18-20). Based upon this information and his observations during his site visit, witness Wittliff concluded that most of the costs incurred in 2018 appear to be related to beneficiation efforts and not compliance with the federal CCR rules. (R. p. 1115-36, ll. 20-23). According to witness Wittliff, the federal CCR rule does not require beneficiation and as a result, no savings could accrue to customers as a result of beneficiation performed pursuant to North Carolina's CAMA. (R. p. 1212, ll. 5-10). For this reason, witness Wittliff recommends disallowing the difference between the 2018 spend through September 30 ($20,599,578) and the average of the previous three (3) years $11,391,867 for a total disallowance of $9,207,711. (R. p. 1115-36, l. 23-p. 1115-37, ll. 1-2).

CCR rule. (R. p. 1115-42, ll. 21-23). Accordingly, witness Wittliff's calculations result in a recommended disallowance of $6,044,240.

Witness Wittliff's recommendations and the underlying rationale are summarized in the table below:

Table 5.4: Duke Energy Progress Reimbursement Request and Disallowances

Plant	Cost Data				
	Total Project (from SCORS DEP 10-08)	Amount Requested (1/1/15-9/30/18, SCORS DEP 10-08)	Disallowance	Rationale	Allowance
Asheville	$ 452,038,793	$ 191,934,196	$ 98,220,932	CAMA High Priority - Accelerated Schedule -- Allow what would have been incurred for "Cap-In-Place" only	$ 93,713,264
Cape Fear	$ 504,918,488	$ 33,631,199	$ 33,631,199	No Federal CCR Requirements	$ -
HF Lee	$ 568,383,919	$ 54,775,180	$ 9,207,711	Beneficiation - CAMA Only -- Allow Engineering and Planning	$ 45,567,469
Mayo	$ 206,749,586	$ 25,384,168	$ -	Federal CCR Compliant	$ 25,384,168
Robinson	$ 179,561,777	$ 11,431,675	$ -	Federal CCR Compliant and SCDHEC Requirements	$ 11,431,675
Roxboro	$ 349,803,401	$ 34,070,691	$ -	Federal CCR Compliant	$ 34,070,691
Sutton	$ 493,219,171	$ 255,525,554	$ 186,376,226	CAMA High Priority - Accelerated Schedule -- Allow Engineering and Planning`	$ 69,149,328
Weatherspoon	$ 209,724,346	$ 28,287,429	$ 6,044,240	Excavation and Beneficiation Off-Site -- CAMA -- Allow E&P Through 9/30/17 and Half Costs 10/01/17 through 9/30/18	$ 22,243,189
TOTAL	**$ 2,964,399,482**	**$ 635,040,092**	**$ 333,480,308**		**$ 301,559,784**

(R. p. 1115-45, l. 1).

According to witness Seaman-Huynh, DEP directly assigns certain costs to its North Carolina and South Carolina jurisdictions and that often these costs are derived from laws and

DEP's Position

According to DEP witness Kerin, DEP is seeking recovery of CCR expenses incurred from July 2016 through September 2018 and estimated costs to be incurred October 2018 through December 2018 related to compliance with applicable regulatory requirements. (R. p. 850-6, ll. 10-12). According to witness Kerin, DEP has become subject to both federal and North Carolina regulatory requirements that mandate closure of its coal ash basins and other ash storage areas. (R. p. 850-6, ll. 18-19).

In June 2010, the United States Environmental Protection Agency ("EPA") proposed national minimum criteria to regulate the disposal of CCRs and the operation and closure of active CCR landfills and existing and inactive CCR surface impoundments. (R. p. 850-7, ll. 14-17). Approximately five years later, the EPA published the final CCR Rule in the Federal Register in April 2015. (R. p. 850-7, ll. 17-18). In South Carolina, DEP entered into a Consent Agreement with the South Carolina Department of Health and Environmental Control ("SCDHEC") in July 2015. (R. p. 850-7, ll. 19-21). Pursuant to this agreement, DEP agreed to excavate its coal ash basins and ash storage areas at the Robinson Steam Station in Darlington County, South Carolina. (R. p. 850-7, ll. 21-23). Also, in 2014, the state of North Carolina enacted CAMA, which requires that all coal ash basins in North Carolina be closed, either through excavation or via the cap-in-place method. (R. p. 850-8, ll. 3-6). The Company has begun the process of closing, or submitting plans to close, its coal ash basins in accordance with the program with the most restrictive requirements. (R. p. 850-8, ll. 8-10). The Company requested recovery of the incremental compliance costs related to coal ash pond closures incurred starting July 2016 to August 2018 and expected costs from September 2018 to December 2018. (R. p. 850-8, ll. 22-23, p. 850-9, ll. 1-2).

Duke Energy management made specific decisions that resulted in the coal ash spill in North Carolina, that in turn, led to the creation of CAMA. (Direct, p. 38, ll. 32-33). Witness O'Donnell's analysis in North Carolina concluded that Duke Energy stockholders should pay 75% of the North Carolina's CAMA costs. (Direct, p. 39, ll. 1-2). According to witness O'Donnell, stockholders should to be held accountable for the actions of Duke Energy executives that led to the Dan River spill, which in turn, led to the passage of North Carolina's CAMA, and given the fact that the DEP coal ash costs are so much higher than utilities operating in a similar manner, he believes consumers and stockholders should share the cleanup coal ash costs 75/25. Direct, p. 44, ll. 7-11).

Additionally, witness O'Donnell testified that North Carolina's CAMA was more stringent than the federal CCR rules. Quoting Mark McEntire, Duke Energy's director of environmental policy, witness O'Donnell said "'[t]he NC law came before the CCR [rule] . . . We find that NC CAMA that is specific to NC is generally driving decision making on a management perspective on coal ash . . . From a comparison perspective the CAMA is generally a good bit more stringent.'" (Surrebuttal, p. 4, ll. 14-18).

Sierra Club's Position

Dr. Ezra Hausman[22] testified regarding the costs and risks associated with continued operation of DEP's Mayo and Roxboro plants and cautioned against the continued investment in coal units that are likely to be uneconomic for customers. (R. p. 786-5, ll. 6-8). Dr. Hausman recommended that the Commission reject DEP's request to recover its $100 million investment in retrofits at the

[22] During the evidentiary hearing, Sierra Club failed to request the Commission accept into the record Exhibits 12, 13, and 14 to Dr. Hausman's testimony. In a post-hearing motion, Sierra Club requested – and no party objected – that the Commission accept those Exhibits into the record under seal. That motion is hereby granted.

charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled…." S.C Constitution Article IX, § 1 states, "[t]he General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately-owned utilities serving the public as and to the extent required by the public interest." According to South Carolina Electric & Gas Company v. Randall, 333 F.Supp.3d 552, 570,

> Even though the South Carolina General Assembly has entrusted the PSC with rate-making power, this grant of power is still subordinate to the General Assembly's rate-making authority. *See Duquesne*, 488 U.S. at 313–14, 109 S.Ct. 609 ("It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates."); *Glendale Water Corp. of Florence v. City of Florence*, 274 S.C. 472, 265 S.E.2d 41, 42 (1980) (stating the PSC was "creat[ed] by the General Assembly [and] derive[es] all its powers therefrom").

"An administrative agency is generally not bound by the principle of *stare decisis* but it cannot act arbitrarily in failing to follow established precedent." *330 Concord St. Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) (*See Courtesy Motors Inc. v. Ford Motor Co.*, 384 S.E.2d 118 (Va. Ct. App. 1989)).

Also, "[t]he declaration of an existing practice may not be the substitute for an evaluation of the evidence. A previously adopted policy may not furnish the sole basis for the Commission's action." *See Heater of Seabrook, Inc. v. PSC,* 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998) (quoting *Hamm v. PSC*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992).

Environmental Control ("DHEC"). (R. p. 1115-33, ll. 11-14). DHEC is a state agency with authority to implement and enforce laws and related regulations pursuant to the South Carolina Hazardous Waste Management Act, S.C. Code Ann. § 44-56-10 *et seq.*; the Pollution Control Act, S.C. Code Ann. § 48-1-10 *et seq.*; and the South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. § 44-96-10, *et. seq.* (Hearing Exhibit No. 60, DJW-2 and DJW-3). These Acts authorize the Department to issue orders; assess civil penalties; conduct studies, investigations, and research to abate, control and prevent pollution; and to protect the health of persons or the environment. *Id.* It was pursuant to this authority that DHEC and Duke entered into these Consent Agreements. Because these costs were incurred in compliance with proper consent agreements entered into by a South Carolina agency and in the absence of factors that would otherwise persuade this Commission that these costs should not be recovered, this Commission finds the recovery of these costs just and reasonable.

The Commission is mindful that it must balance the interests of DEP with those of DEP's customers and is concerned about the magnitude of costs DEP seeks to place upon its customers. This Commission understands that North Carolina's CAMA may impose billions of additional costs upon DEP customers. When asked where the costs would end, ORS witness Seaman-Huynh stated, "[i]t ends for ratepayers where this Commission says it ends." (R. p. 1200, ll. 1-3).

Witness Wittliff, testified that he reviewed data provided to him by DEP for two years in reaching his well-reasoned conclusions. (R. p. 1210, ll. 4-8). This Commission had no opportunity to influence the sequence of events that led to DEP now seeking these expenses. The great weight of the testimony causes this Commission to conclude that costs incurred solely as a result of North Carolina's CAMA shall not be recoverable from DEP's South Carolina customers at this time.

DEP's Position

DEP witness Doss testified regarding DEP's new depreciation rates along with a revised depreciation study. (R. p. 634-9, ll. 4-5). According to witness Doss, DEP is requesting an increase to customer rates at this time based on the revised depreciation rates. (R. p. 634-9, ll. 19-22). Witness Doss testified that DEP commissioned Gannet Fleming Valuation and Rate Consultants, LLC to perform a revised depreciation study as of December 31, 2016, which was included as Doss Exhibit 2. (R. p. 634-10, ll. 1-6). Finally, DEP witness Doss requested that the Commission approve its revised customer rates base on the revised depreciation rates and depreciation study adjustments as shown in Doss Exhibit 3 and Bateman Exhibit 1, page 4b. (R. p. 634-12, ll. 7-9).

Commission Finding

According to S.C. Code Ann. § 58-27-810 every rate received by an electrical utility must be just and reasonable. The Commission finds that the evidence in the record supports a finding that DEP's requested revisions to its depreciation rates is just and reasonable.

D. Cost of Service Study

ORS's Position

Regarding DEP's proposed Cost of Service Study, witness Seaman-Huynh testified that, for purposes of this Application, the methodology applied in constructing the Company's COSS was reasonable. (R. p. 1099-6, ll. 3-4). ORS witness Seaman-Huynh testified regarding the Company's rate design and proposed increase to its BFC. (R. p. 1099-2, ll. 12-16). According to witness Seaman-Huynh, ORS recommends the Commission determine the rate design that balances utility rate design principles. (R. p. 1099-10, ll. 3-5). The magnitude of the increase proposed by DEP to the BFC does not promote a gradual transition to a new rate design. (R. p.

b. In the control of the relative uses of alternative types of service by ratepayers (on-peak versus off-peak service or higher quality versus lower quality service).

5. Reflection of all of the present and future private and social costs and benefits occasioned by a service's provision (i.e., all internalities and externalities).

6. Fairness of the specific rates in the apportionment of the total costs of service among the different ratepayers so as to avoid arbitrariness and capriciousness and to attain equity in three dimensions: (1) horizontal (i.e., equals treated equally); (2) vertical (i.e., unequals treated unequally); and (3) anonymous (i.e., no ratepayer's demands can be diverted away uneconomically from an incumbent by a potential entrant).

7. Avoidance of undue discrimination in rate relationships so as to be, if possible, compensatory (i.e., subsidy free with no intercustomer burdens).

8. Dynamic efficiency in promoting innovation and responding economically to changing demand and supply patterns.

Practical-related Attributes:

9. The related, practical attributes of simplicity, certainty, convenience of payment, economy in collection, understandability, public acceptability, and feasibility of application.

10. Freedom from controversies as to proper interpretation.

(R. pp. 1101-3, 4).

According to witness Seaman-Huynh, the Company's proposal falls short of Bonbright attributes 3, 4, 8, and 9. (R. p. 1101-4, ll. 10-12). Additionally, the impact to customers using relatively small amounts of energy (e.g., low income and fixed income customers) would be also recommended, that as DEP had proposed, the BFCs for the S&I schedules match that of the MGS. (R. p. 1099-15, ll. 1-3).

ORS witness Dr. Ruoff testified regarding the Company's proposed increase to the BFC. According to Dr. Ruoff, company witness Wheeler portrays the increase as intended "to reflect full cost recovery of the customer component identified in the unit cost study" and "to minimize subsidization of customers within the rate class." (Wheeler Rebuttal Testimony, pp. 3-4.). (R. p. 1061-4, ll. 3-6). According to Dr. Ruoff, the Company sought to characterize this shift as simply an intra-class shift from high users to low users. (R. p. 1061-4, ll. 6-7). However, Dr. Ruoff testified that front-loading customer costs also shifts the revenue risks of lowered load growth, improved weatherization and efficiencies in heating and air conditioning and appliances, distributed generation expansion, and battery storage expansion from the Company onto customers. (R. p. 1061-4, ll. 7-10).

According to Dr. Ruoff, company witness Ghartey-Tagoe suggests that this shift mostly affects "low usage customers, such as people with vacation homes or people with second homes elsewhere in the state of South Carolina." (R. p. 1061-4, ll. 11-13). However, witness Wheeler presents clear evidence in his chart "# of DEP Low Income Bills by Usage Level (Household Income < $30,000)," that most low-income customers, including low-income seniors and renters, are low usage customers. (R. p. 1061-4, ll. 13-16). According to Dr. Ruoff, this risk shift falls on all but the higher use customers, but most heavily on low income customers—those who are least able to afford this increase and for whom the increase most threatens their ability to:

1. Pay rent or mortgages in decent, safe and affordable housing;

2. Ensure that those homes are not dark, cold or hot, even life-threateningly so;

701-14, ll. 16-19). This methodology allows the utility to assess how much of its distribution system is installed simply to ensure that electricity can be delivered to each customer, if and when the customer chooses to use electricity. (R. p. 701-14, ll. 19-22).

Witness Wheeler testified that DEP's proposed rates must be set to achieve the necessary total revenue requirement and reflect the cost of service within the five major rate classes: residential, small general service, medium general service, large general service, and various outdoor lighting schedules. (R. p. 709-8, ll. 16-19). Witness Wheeler testified that DEP conducted a unit cost study and it indicated it was appropriate to raise the monthly Basic Facilities Charge to better reflect all customer-related costs and failing to do so would result in customer cross-subsidization. (R. p. 709-8, ll. 22-23, p. 709-9, l. 1). Accordingly, DEP originally proposed to increase the Basic Facilities Charge in schedule RES from $9.06 to $29.00; from $9.91 to $29.00 for all Small General Service schedules; to $29.00 for the SGS Constant Load rate class; from $17.17 to $40.03 for Medium General Service schedules; from $23.17 to $46.53 for SGS-TOU; to $46.53 for SGS-TES; to $40.03 for CSE and CSG; from $98.00 to $195.00 for Large General Service; to $40.03 for sports field lighting service rate class and the S&I service rate class, to match the Medium General Service schedule; and to $29.00 for traffic signal rate class to match the SGS basic facilities charge. (R. pp. 709-14-709-35). In his surrebuttal testimony, DEP witness Wheeler testified that the Company understands the concern with a large increase to the BFC for residential customers, as a result, witness Wheeler offered an alternative to what he originally proposed. (R. p. 711-10, ll. 6-13). According to witness Wheeler, a possible approach would be what was offered by the Company in its recent North Carolina rate case where the increase in the Basic Facilities Charge rate was set equal to 50% of the difference between the current rate and the cost basis, Witness Wallach testified that DEP has not justified its proposal to more than triple the residential BFC. (R. p. 254-4, ll. 22-23). According to witness Wallach, DEP has classified a portion of the cost of its distribution grid as customer-related in the COSS based on a "minimum-system" analysis. (R. p. 254-5, ll. 2-4). Witness Wallach testified that the minimum system method is flawed because it erroneously classifies some distribution grid costs—a portion of the cost of poles, wires, conduits, and transformers—as customer-related, even though they are in fact driven by usage and therefore properly classified as "demand-related," which results in an overstatement of customer-related costs appropriately recovered through the BFC. (R. p. 254-5, ll. 5-10). Witness Wallach recommended that DEP should classify all such distribution-grid costs as demand-related. (R. p. 254-5, ll. 13-15);

Additionally, witness Wallach cited a 1988 Commission order granting a rate increase to DEP's predecessor, Carolina Power & Light Company ("CP&L"), in which this Commission rejected an intervenor's recommendation that CP&L use the minimum-system method to classify distribution costs.[24] (R. p. 254-5, n. 2).

Finally, witness Wallach testified that the Company's proposal to recover usage-driven costs through the residential BFC would:

- Lead to subsidization of high-usage residential customers' costs by low-usage customers, and thereby inequitably increase bills for the Company's low-usage residential customers; and

- Dampen price signals to consumers for controlling their bills through conservation, energy efficiency, or distributed renewable generation. (R. p. 254-6, ll. 1-8).

[24] Order No. 88-864, Docket No. 88-11-E, 11 (August 29, 1988).

Public witnesses at the night hearings consistently testified that the BFC rates as proposed by DEP were too high. Among those testifying as to the harm that would be caused if the Commission granted DEP's proposed BFC rate were several farmers and representatives of the agribusiness community. Several members of the agricultural community testified that the rate proposed on top of the current difficulties facing the farming community would have a negative impact on farmers, with some voicing specific concern over the impacts on farmers on the MGS rate. For example, Mr. Anthony Ward, a farmer, testified that with floods, hurricanes, and rainfall, accompanied by 133 percent rate increase for those meters that are attached to irrigation pivots, he cannot make it. Many others testified similarly.

Commission Finding

According to S.C. Code Ann. § 58-27-810 every rate received by an electrical utility must be just and reasonable.

"An administrative agency is generally not bound by the principle of *stare decisis* but it cannot act arbitrarily in failing to follow established precedent." *330 Concord St. Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) (*See Courtesy Motors Inc. v. Ford Motor Co.*, 384 S.E.2d 118 (Va. Ct. App. 1989)).

Also, "[t]he declaration of an existing practice may not be the substitute for an evaluation of the evidence. A previously adopted policy may not furnish the sole basis for the Commission's action." *See Heater of Seabrook, Inc. v. PSC,* 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998) (quoting *Hamm v. PSC*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992).

In considering the reasonableness of the Company's Cost of Service Study, this Commission must review two issues: whether the Minimum System Method is appropriate for determining the manner by which a party can employ Bonbright's principle of gradualism. (R. p. 779-16, ll. 17-22, p. 779-17, ll. 1-8). In the same manner testified to by witness Barnes, witness Seaman-Huynh, presented for this Commission's consideration an objective methodology, which this Commission could employ and achieve the goal of gradualism. (R. p. 1099-10, ll. 12-17, p. 1099-12, ll. 8-15, and p. 1099-15, ll. 14-18). Finally, DEP submitted a letter in which it sought to employ witness Seaman-Huynh's objective methodology combined with the testimony given at the public night hearings and stated that it did not contest a BFC of $11.78 for residential customers, $12.34 for SGS customers, and $11.31 for SGS Constant Load customers. (*See Also* R. p. 296, ll. 17-25).

Based upon the evidence, this Commission finds that the following rates to charge DEP customers for BFCs are just and reasonable: $11.78 for residential customers; $12.34 for SGS customers; and $11.31 for SGS Constant Load customers. For MGS and S&I customers, we instruct the Company to limit the increase to the BFC to be no greater than the average percentage increase of the SGS and SGS Constant Load customers. These figures are supported in the record by testimony of ORS and DEP witnesses and are derived from an objective methodology that achieves the goal of gradualism, which was supported by the testimony of witness Barnes.

E. Proposed Changes to Differentials in Energy and Demand

ORS's Position

Regarding the changes to the differentials in energy and demand charges proposed by Company witness Wheeler, ORS witness Seaman-Huynh recommends the Commission reject the proposed changes. (R. p. 1099-10, ll. 18-20). According to witness Seaman-Huynh, DEP states it is in the process of deploying its AMI program in its South Carolina territory. (R. p. 1099-10, ll. 20-21). DEP intends to use customer usage data gathered from the AMI program to develop and

Wheeler testified that continuing with the current rate emphasis encouraging winter load is contrary to the Company's adoption of a winter planning criteria for resource planning purposes. (R. p. 711-13, ll. 7-9). According to witness Wheeler, the Company's recommended changes, which the ORS rejects, include:

1. Under Residential Service Schedule RES, the ORS recommends retaining the current one cent per kWh declining block rate in the non-summer months. The Company recommends reducing it to 0.5 cents per kWh to reflect its current winter peak planning criteria since winter load additions, not summer, now primarily influence generation resource additions. Consequently, higher rates should apply in the winter months to more properly price the impact of winter peak load additions. Further reduction in the current summer pricing emphasis should be considered in future rate cases.

2. Under Residential Service Time-of-Use Schedule R-TOUD, the ORS recommends retaining the current price relationships between summer and non-summer demand rates and on-peak and off-peak energy rates. The Company's proposed design reduces the difference between summer and non-summer demand rates to start to shift the price emphasis toward winter demands that drive generation additions and reduces the difference between on-peak and off-peak energy rates to reflect the narrowing of the difference in current on-peak and off-peak marginal energy costs.

3. Under Small General Service Time-of-Use Schedule SGS-TOU, the ORS recommends retaining the current price relationships between summer and non-summer demand rates and on-peak and off-peak energy rates. For the same reasons cited above for Schedule R-TOUD, the Company's proposed design reduces the difference between summer and non-summer demand rates and reduces the difference between on-peak and off-peak energy rates.

the Company to gather usage data from its customers. While this Commission understands the Company's position, the Company has alleged no harm that will come of delaying the change to the differential between energy and demand charges, such as requested in this proceeding. However, ORS witness Seaman-Huynh has presented evidence that a change at this juncture, before additional data gathered from AMI can be utilized to tailor a requested change, could harm DEP's customers. This Commission therefore finds the request to be premature and denies DEP's request to change the differential in between energy and demand charges at this time. Once additional data from AMI has been gathered, DEP may seek the requested change from this Commission.

F. Litigation Expenses (Adjustment #36)

ORS's Position

ORS recommends limiting recovery of legal expenses to only incurred costs that are supported by sufficient supporting documentation to show the legal expenses are approved regulatory expenses that are properly recoverable through rates. (*See* Tr. p. 1383 ("[W]e [ORS] got a cover sheet [of legal expenses]. We didn't get any information as to the services rendered . . . behind the numbers.") ORS asserts that DEP seeks recovery of legal expenses that are not related to providing adequate electrical service to customers and from which customers derived no benefit. (Tr. p. 1317) These legal costs should be the shareholders' responsibility, which incentivizes the regulated utilities to operate in compliance with federal, state and local laws. (Tr. p. 1317.) ORS asserts that the justifications provided by the Company for the legal expenses at-issue "do not address the reason the expenses were incurred initially[,]" and that, overall, the Company failed to provide "the substantial evidence required by decisions issued by the South Carolina Supreme Court" to recover expenses that are properly challenged. (*See* Tr. p. 1309.)

At the hearing, DEP offered what it represented to be supplemental responses to the ORS AIR's on coal ash litigation expenses, which DEP produced to ORS on April 3, 2019 and April 7, 2019. (Tr. pp. 1349-50.)

Commission Finding

According to S.C. Code Ann. § 58-27-810 every rate received by an electrical utility must be just and reasonable. In *Utilities Services of S.C.*, the Court stated the following with respect to the presumption and burden to be applied to a utility's expenditures:

> Utility is correct that it was entitled to a presumption that its expenditures were reasonable and incurred in good faith, and therefore, a showing that its expenses had increased since its last rate case could satisfy its burden of proof. Nevertheless, the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs. It seems to us that Utility wants the presumption of reasonableness to be dispositive. In Hamm, 309 S.C. at 286-87, 422 S.E.2d at 112-13, we stated: Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence. This evidence may be provided . . . through the Commission's broad investigatory powers. **The ultimate burden of showing every reasonable effort to minimize . . . costs remains on the utility**. (emphasis added)

Utils. Servs. of S.C., 392 S.C. at 109-10, 708 S.E.2d at 762-63 (citing *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286-287, 422 S.E.2d 110, 112-113 (1992)).

"If an investigation initiated by ORS or by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures." *Utils. Servs. of S.C.*, 392 S.C. at 110, 708 S.E.2d at 763.

Jones, 353 N.C. 159, 165, 538 S.E.2d 917, 923 (2000). ORS seeks to prevent DEP from charging its customers with any legal costs or expenses flowing from or related to its guilty pleading of criminal negligence.

Months before the start of the DEP rate case before the Commission, ORS staff were seeking to review and examine the coal ash legal expense evidence that DEP claimed justified its contested coal ash related legal expenses in the amount of $389,995 should be included in customer rates. (*See* Tr. 1310-5, -7; Ex. 67.) During discovery, ORS requested the underlying invoices, billings and records and explanations that DEP claimed support DEP's argument that all coal ash legal costs and expenses should be included in customer utility rates. While DEP may be entitled to a presumption of reasonableness, once challenged, DEP has the burden of proof to substantiate the expense for which it seeks recovery by identifying, collecting, presenting and explaining the DEP coal ash legal expense evidence it introduced into the hearing record.

DEP was on notice in late 2018 that ORS was seeking discovery and substantial evidence supporting its rate case claim that all DEP coal ash legal expenses were reasonable and should be paid by DEP customers in their utility rates. During the rate hearing, ORS witnesses Morgan and Hamm testified that the company failed to provide the Commission with substantial factual and other related evidence required for the Commission to approve that those expenses be included in DEP customer rates. The evidence of record is sufficient to raise the "specter of imprudence" as to the origins of the litigation expenses that DEP seeks to recover in this case. *See Utils. Servs. of S.C.*, 392 S.C. at 109-110, 708 S.E.2d at 762-63

No DEP witness was offered before the Commission to present and explain the individual line-item legal and expense summary and dollar amounts listed in the computer print outs provided could have avoided the expense" by fulfilling its obligations as a regulated utility. (Order No. 2018-802 at p. 19 (citing *State ex rel. Utilities Comm'n v. Pub. Staff, NCUC*,317 N.C. 26, 41, 343 S.E2d 898, 907-08 (1986)).

DEP claims that the presumption of reasonableness is sufficient to support Commission approval of its contested legal expenses. The South Carolina Supreme Court made clear that the presumption of reasonableness does not shift the burden of persuasion. "[T]he ultimate burden of showing every reasonable effort to minimize costs remains on the utility." *Utils. Servs. of S.C.*, 392 S.C. at 110, 708 S.E.2d at 762–64.

An examination of the DEP responses to ORS legal expense discovery filings merely reflect a series of dollar amounts without any reference to the specific litigation matter prompting the litigation expense in the first place. DEP failed to provide the Commission with any basis to support a claim that customers are responsible reimbursing DEP since the data provided by DEP is devoid of any case specific identifying data. DEP must substantiate the expenses for which it seeks recovery, and DEP has failed to do so. As a result, this Commission finds that DEP may not recover the associated legal expenses for which it seeks recovery. In addition, we note that expenses related to the CertainTEED Gypsum NC, Inc. litigation are also included in litigation expenses addressed by Adjustment 36. (*See* Tr. pp. 1310-8, -9.) For the reasons discussed in the next section of this Order, we conclude that DEP may not recover $389,995 Coal Ash Litigation Expenses.

reasonable for customers to bear the entire $90 million cost of the settlement. (*See* Coppola Summ.; Coppola cross-examination by ORS.)

Commission Finding

The Commission concludes that the most instructive evidence of record on whether DEP's payment obligations to CertainTEED are allowable expenses is provided by the Opinion and Final Judgment issued by the North Carolina Business Court in the litigation between DEP and CertainTEED. (*See* Ex. 67, WJM-2.) The Opinion and Final Judgment shows that DEP elected to breach a contract and then failed to successfully defend the claim filed by CertainTEED in the ensuing litigation. DEP now requests the Commission require customers to pay for the costs of this adverse management decision.

In considering this issue, the Commission is mindful that it must balance the interests of the utility with those of the ratepayer. DEP seeks recovery of expenses for an action in a court in which it was not successful. We find that ratepayers should not be responsible for the payment of litigation expenses incurred in defending an action in which the ratepayers derived no benefit from the expenditures. DEP was found to have failed to comply with its agreement and "failed to carry its burden of proof on its defenses." (*See* Ex. 67, WJM-2 at ¶237.) This showing, coupled with the magnitude of DEP's payment obligation of $90 million, clearly raises concerns. *See Utils. Servs. of S.C.*, 392 S.C. at 109-110, 708 S.E.2d at 762-63. The Company asserts that a series of contractual relationship between DEP and CertainTEED provided a net benefit to customers, (*see* Coppola Rebuttal pp. 2-3), but has produced no corresponding evidence to show that the decision to breach and the resulting $90 million payment obligation was in the interest of customers. On the record before us, this Commission finds this obligation should not be charged to ratepayers.

linemen refine their skills, and it is an important tool for recruitment. (Tr. p. 645-14, l. 14 to p. 645-15, l. 4.) DEP also asserts that "employee incentives, service and safety awards, and any costs to recognize and reward . . . the Company's employees who serve our customers" should be allowed. (Tr. p. 318, ll. 13-18.) This includes on-the-spot bonuses and exceptional contribution awards "to provide timely recognition to employees who make a significant contribution to business operations." (Tr. p. 645-13, ll. 20-21.)

Likewise, DEP supports recovery of service (retention) and safety awards. (Tr. p. 645-14.) "Retention of [] critical skills are important to providing quality customer service," and "[c]elebrating successful completion of critical safety milestones is an important part of providing a safety culture." (Tr. p. 645-14.) The Company also disagrees "with the removal of [any] organization dues in support of business economic development in the communities we serve." (Tr. p. 318, ll. 18-20.) The Company supports "reward and recognition" expenses, related to items like team lunches and office parties, as "a necessary part of creating and fostering a supportive corporate work environment." (Tr. p. 645-15, ll. 8-9.)

During the hearing as part of the Non-allowables Stipulation, the Company agreed that it would withdraw its request to recover $39,532 in costs related to employee recognition and reward and $112,736 in other miscellaneous costs. (Tr. Vol. 5-1, p. 817-819.)

Commission Findings

After ORS began its audit review of the Company's filing, it submitted to the Company a list of miscellaneous O&M expenses totaling approximately $875,000 that ORS determined were non-recoverable. Subsequent to receiving ORS's recommendations, the Company proposed Adjustment #36, recommending an adjustment of ($97,000) and income taxes of $24,000 to

No. 94-1229 at 25; Docket No. 95-1000-E, Order No. 96-15 at 30-31; Docket No. 2000-207-WS, Order No. 2001-887 at 36; Docket No. 2001-164-WS, Order No. 2002-285 at 11; Docket No. 2012-218-E, Order No. 2012-951 at 24.) As DEP acknowledged with respect to luxury-type expenses, "perception is reality[.]" (Tr. p. 671.)

It is the established practice of this Commission to disallow "safety and length of service awards" as well as "other miscellaneous gifts and awards." (Order No. 1994-1229 at 25; *see also* Order No. 1996-15 at 30 (disallowing recovery for "employee awards").) Likewise, "novelty items" and "luncheons" have been disallowed. (Order No. 1994-1229 at 25; Order No. 1991-595 at 23.) We have allowed "grocery items," particularly ones that relate to maintaining "sanitary conditions" in the workplace, (Order No. 90-694 at 27), and have long-recognized that Chamber of Commerce dues are 50% allowed. (Order Nos. 94-1229 at 26; Docket No. 95-1000-E, Order No. 1996-15 at 30-31; 01-887 at 36; 02-285 at 11.) We have previously disallowed expenses for non-professional organizations such as social and athletic clubs, (*e.g.* Docket No. 90-626-C, Order No. 91-595 at 20-21; Docket No. 93-503-C, Order No. 94-1229 at 8-9), and for charitable expenses, (Docket No. 89-178-E, Order No. 90-75 at 9). These expenses "have been traditionally classified as non-operating, or 'below-the-line', expenses for ratemaking purposes." (Docket No. 79-196-E, Order No. 79-730 at 67; *accord* Docket No. 79-196-E, Order No. 80-375 at 61; Docket No. 89-178-E, Order No. 90-75 at 9.) The record in this case clearly reflects that these expenses have at best a tangential relationship to DEP's provision of adequate and reliable electric service. DEP can be a good corporate citizen even if customers do not pay all the bills for DEP's tax-favored expenditures. (*See* Tr. 420.)

Approximately 52.5% of DEP's LTI payouts are directly tied to the Company's stock performance. (Tr. p. 1238-4.) An additional 30% of DEP's LTI payouts, approximately $947,000, are directly tied to retention. (Tr. p. 1238-4; *see also* Ex. 26.) For DEP's Executive Leadership Team ("ELT"), 50% of STI is directly tied to earnings. For all other employees, 30% of STI is directly tied to earnings. (*Id.*)

ORS witness Major testified an adjustment of 50% to LTI and STI program costs would equitably share the costs between customers and shareholders. (Tr. pp. 1238-4, -5.) Both customers and shareholders benefit when employees perform their duties. (*See* Tr. pp. 1270-71.) DEP's shareholders are the primary benefactors of increased EPS and TSR. (Tr. pp. 1238-4, -5.) EPS and TSR can increase "due to an increase in the Company's rates through a rate case with no actual improvement of company efficiency or operating performance[.]" (Tr. p. 1265.) Because these incentives are directly tied to stock performance rather than service to customers, a balanced approach is needed to fairly allocate the customer burden. (Tr. p. 1238-4.)

ORS's testimony addressed how the costs of funding DEP's employee compensation packages should be allocated among DEP's revenue sources. (Tr. p. 1238-5.) ORS did not make any recommendations as to how much DEP should pay its employees or to how any employees' incentive compensation packages should be structured or disagree with "the Company's total compensation program[.]" (Tr. pp. 1238-5, 1273.)

<u>DEP's Position</u>

DEP witness Metzler testified incentive pay is linked to specific goal accomplishments. Incentive pay thereby encourages employees to accomplish certain objectives, promotes DEP's overall success, and provides for a compensation package that is market-competitive. (Tr. p. 645-5, ll. 8-13.) DEP witness Ghartey-Tagoe noted, "[t]he Company has an obligation to be responsive performance and customer satisfaction, all of which are components of incentive pay, are met in a cost-effective way." (Tr. p. 643, ll. 11-17.)

DEP offered as an alternative position to "remove the actual portions [of total LTI and STI compensation] that are related to EPS and TSR," resulting in a disallowance of $2,582,000." (Tr. p. 650, ll. 14-19.). Excluding incentive compensation associated with EPS and TSR for just the CEO and ELT, the disallowance "would be approximately 622,000." (Tr. p. 650, l. 23 to p. 651, l. 5.) DEP continues to maintain that retention awards, because "not based on EPS or TSR" should be allowed. (Tr. p. 662, l. 22 to p. 663, l. 4.)

Commission Findings

As this Commission has previously recognized, it is just, reasonable, and consistent with sound regulatory policy to allow the Company to recover a portion of the cost of incentive pay for its officers and employees through rates. *See* Docket No. 2012-218-E, Order No. 2012-951, p. 18. "This treatment of incentive or at-risk compensation is consistent with treatment afforded to this expense item in past rate cases for . . . other electric utilities." *Id.* at 29. While "[t]he declaration of an existing practice may not be the substitute for an evaluation of the evidence," *see Heater of Seabrook*, 332 S.C. at 26, 503 S.E.2d at 742, several additional considerations serve to establish that a blended allowance/disallowance of incentive compensation is reasonable and appropriate in this case as well.

Most importantly, the evidence of record suggests that appropriately structured incentive compensation programs benefit shareholders and customers. Shareholders and customers share the benefits of DEP attracting and retaining quality employees. We conclude they should equitably share in the costs. To some extent, the proper level of allowable incentive compensation is difficult a cheaper way to do the same job, customers can see a decrease in their monthly bill and shareholders an increase in their dividend. This Commission has previously approved limited recovery and a division of these costs between customers and shareholders. We believe that, based on the record evidence as a whole, that a similar split is reasonable under the circumstances now before this Commission.

J. Adjustment for Customer Connect (Adjustment #30)

ORS's Position

ORS witness Major through Surrebuttal Testimony updated ORS's position on Customer Connect O&M expense to accept the 2018 actual O&M amount recommended by DEP witness Bateman which, after factoring in the $160,000 in Customer Connect expenses already included in the test year expenses, resulted in an adjustment to O&M of $763,000. (Tr. p. 1238-9.)

ORS recommends that the Commission deny recovery from customers $550,000 of inflation and contingency costs included by DEP in Adjustment #30 to normalize O&M for Customer Connect expenses based on the longstanding accounting principle that adjustments to Test Year expenses must be known and measurable. (*See* Tr. p. 1602-14, ll. 4-9.) As the inflation and contingency projections proposed by the Company are neither known nor measurable under regulatory principles, but merely estimates formulated by DEP employees, they should be denied by the Commission. (*See* Tr. p. 1238-9 (citing Commission Order Nos. 84-108 and 85-841).) Further, including these inflation and contingency estimates in the adjustment insulates the Company from any risks associated with project delays or cost overruns by shifting the risk to customers. (Tr. p. 1238-9.).

O&M expense associated with the project from approximately $200,000 to approximately $1.4 million, which reflects the average expected annual O&M expenses over the next two years, from 2019 through 2020. (Tr. p. 480, ll. 13-18.) ORS has agreed to use of the 2018 actual Customer Connect O&M-spend of $923,000. (Tr. p. 1238-9; Tr. pp. 326-18, -19.) ORS and DEP dispute whether customers should be required to pay for an additional $550,000 in estimated inflation and contingency costs that DEP includes in Adjustment #30.

Rate applications must be based on a historic 12-month test period. S.C. Code Ann. Regs.103-823(A)(3). Any adjustments to the Test Year must reflect known and measurable changes in the Company's operating experience. *Heater of Seabrook, Inc. v. Public Serv. Comm'n of South Carolina,* 324, S.C. 56, 60, 478 S.E. 2d 826, 828 (1996) (citing *Southern Bell Tel & Tel. Co. v. South Carolina Pub. Serv. Comm'n*, 270 S.C. 590, 244 S.E.2d 278 (1978)). According to *Hamm v. South Carolina Public Service Comm'n*, when making known and measurable adjustments absolute precision is not required, but the adjustment must be known and measurable within a reasonable degree of certainty. 309 S.C. 282, 291, 422 S.E.2d 110, 115 (1992). By adjusting from the Company's Test Year to the 2018 actual expense, the Commission is relying on a known and measurable amount. We therefore agree with DEP and ORS that the use of the 2018 actuals is reasonable.

However, no statute, regulation, or accounting principle permits the Company to collect from customers unknown and speculative expenses. First, DEP witness Hunsicker testified that the Company is requesting the $550,000 in inflation and contingency to "provide certainty that the program will not spend more than originally estimated." (Tr. p. 484-6.) Thus, the $550,000 reflects the upper limit of the costs of the project rather than reflecting expenses known and establish that an expense is known and measurable. (Tr. pp. 1346-47.) Whether these contracts will be performed under all of their terms (including price) is, to a significant degree, "contingent upon a future event outside the control of" the utility. (*See* Docket No. 2005-13-WS, Order No. 2007-138 at 11.) Concluding that contracts are fixed before they have been fully performed also overlooks the possibility of one or both sides to "fail[] to understand their own contract," which is an issue with respect to the CertainTEED Gypsum contract at-issue in this very proceeding. (*See* Tr. p. 1347.)

DEP's proposed adjustments also require the Commission to look well-beyond the Test Year. ORS and DEP already agreed to update the Customer Connect expenses to reflect the Company's 2018 operating experience; to go further based on the record before this Commission would be inappropriate and inconsistent with settled fundamentals of ratemaking principles.

For these reasons, the Commission adopts ORS's recommendation to adjust other O&M related to Customer Connect to the actual amount experienced by the Company in 2018 of $923,000. (Ex. 65, KLM-2.) Accounting-order Order No. 2018-552 for deferred expenses related to Customer Connect is null and void effective as of the date of this Order.

K. Deferral Treatment

<u>ORS's Position</u>

ORS recommends that DEP recover a "return of" all deferred costs, with the exception of the Coal Ash Disallowance recommended by ORS witness Wittliff. (Tr. p. 1247-5.) To determine whether a return is warranted on a given deferral, ORS recommends that each deferral balance be separated into two categories of costs, operating-related costs and the capital-related costs. (Tr. p. 1247-4.) ORS recommends that each be subject to the same regulatory accounting treatment the fact that operating expenses are typically collected through rates. (Tr. p. 1247-4, -5.) ORS notes that the Company collected $562,000,000 in operating revenues from South Carolina customers during 2017 through rates designed to allow recovery of the Company's operating costs as well as provide a reasonable return on shareholders' capital investments. (Tr. p. 1245-5; pp. 1247-4, -5.) The Company does not rely solely on investments from equity holders or the issuance of debt to generate cash to support its operations. (*See* Tr. p. 1247-5.)

Finally, consistent with fundamental regulatory accounting principles, ORS proposes that O&M expenses are not entitled to a weight average cost of capital ("WACC") return and are not appropriate to include in rate base. (Tr. pp. 1254-4, -5; pp. 1257-4, -5.) However, ORS does not dispute that the Company may recover prudently incurred and deferred capital costs by recording capital costs to rate base and recovering those costs through amortization expense over the life of the asset, while earning a return on the unamortized balance. (*Id.*) ORS contends that its recommendation to limit the Company's ability to earn a return only to deferred capital-related expenses is bolstered by adjustments that allow the Company to include costs that were largely incurred outside of the test year. Out-of-test year expenses include approximately $5,000,000 in amortization expense. (Tr. p. 1247-2.) ORS's recommended accounting treatment contributes approximately $3,500,000 to the ORS original proposed revenue increase of $32,130,000--more than 10 percent. (Tr. p. 1247-2; *see also* Order Ex. A (updating ORS proposed revenue change based on stipulation).) In comparison, the Company's deferred balance proposal includes approximately $16,000,000 in amortization expense and approximately $21,000,000 in unamortized deferral balances in rate base. (Tr. p. 1247-2.) The Company's recommended contends that it is difficult to compare the regulatory approaches to deferrals taken across jurisdictions in this country due to the myriad of regulatory schemes. (*See* Tr. pp. 327-28.)

With respect to the appropriate criteria for deferrals, DEP recommends a generic docket and offers that such a docket would allow more for clearer analysis of "what criteria's appropriate for South Carolina given our regulatory framework[.]" (*See* Tr. pp. 327-28.) "Customers have benefited through the money spent for the underlying costs" and "from delays of and mitigation of rate increases that directly resulted from the deferrals in this case." (Tr. p. 331, ll. 11-15.) When deferrals postpone rate cases, customers benefit every month that their bills are not increased. (Tr. pp. 332-33.) DEP witness Ghartey-Tagoe testified that "deferrals and the ability to earn returns on deferrals" allow the Company to postpone rate cases, and the Company will come in more frequently for rate cases if it cannot employ deferrals. (Tr. p. 398, ll. 7-21.)

Commission Finding

The Company requests recovery of deferred costs from accounting orders which the Company has accumulated. (*See* Application p. 8, nn.5-11; Ex. 66.) In each of the Company's proposed deferrals, the Company calculated a WACC return on deferred costs that it also requests to recover. The Company further proposes to include the unamortized balance of each deferral in rate base. ORS agrees to a "return of" all deferred costs and a "return on" deferred capital related costs, but otherwise disagrees that the deferred balances should earn a return or that the unamortized balances should be included in rate base.

The Company proposes the recovery of deferrals through Adjustments #17 for deferrals granted before the Company's last rate case, #18 for Deferred Environmental Costs, #19 for SC AMI, #30 for Customer Connect, and #35 for SC Grid Mod. (*See* Tr. p. 1247-4.) Adjustment #18, provides all parties with clear expectations. The existence of these objective criteria also promotes transparency and the ability to understand how this Commission sets the rates that a utility is allowed to charge.

We conclude that DEP is entitled to recover a "return of" all deferred costs (with the exception of coal ash costs discussed elsewhere in this Order) and that DEP shall be allowed a return on its capital-related deferred costs only. Such treatment achieves an equitable sharing of deferred costs between customers and shareholders that binding case law requires. *Hope,* 320 U.S. at 603 ("the fixing of 'just and reasonable' rates involve a balancing of the investor and the consumer interests.")

Several other considerations support our conclusion. DEP's proposed treatment for "returns on" deferrals, if strictly applied, would tend to encourage the Company to seek more accounting deferrals for O&M costs that are non-extraordinary. (*See* Tr. p. 1247-8.) The ultimate impact of this practice will be to greatly inflate costs in future years, which will be passed on to customers through rates. (*See* Tr. p. 1247-8.) Allowing a "return on" and rate base treatment of operating expenses also overlooks the fact that operating expenses are typically collected through rates. (Tr. pp. 1247-4, -5.) The Company collected $562,000,000 in operating revenues from South Carolina customers during 2017 through rates designed to allow recovery of the Company's operating costs as well as provide a reasonable return on shareholders' capital investments. (Tr. p. 1245-5; Tr. pp. 1247-4, -5.) Thus, the Company does not rely solely on investments from equity holders or the issuance of debt to generate cash to support its operations. (*See id.*)

These facts and considerations support our conclusion that the Company's requests for a WACC return on every dollar in a deferred account is unreasonable. Finally, the Commission is

ORS witness Sandonato testified that a five-year amortization period for SC Grid Mod will ensure that transmission and distribution investments for which the Company seeks recovery in this rate case will be paid for by the time of the next rate case, when the Company will likely seek to recover its next round of grid investments. (Tr. p. 1049-12.)

DEP's Position

DEP witness Bateman testified that "exact amortization periods are subjective," offering that "there needs to be a balance of consideration of both the impact on customer rates and the impact on the Company's cash flow." (Tr. p. 326-11.) DEP also asserts that "the longer amortization periods exacerbate the disallowance" of a return on deferred O&M costs recommended by the ORS. (Tr. p. 326-11; Tr. p. 839-32.)

With respect to Harris COLA, witness Bateman asserts that ORS's "recommendation [of 8 years] fails to recognize that absent the settlement in the last case, the Company would have begun amortizing these costs starting January 1, 2017." (Tr. p. 326-11.) DEP therefore contends a five-year amortization period for Harris COLA is appropriate. (*Id.*)

Commission Finding

As an initial matter, the Commission notes that ORS and DEP are in agreement with respect to the appropriateness of a five-year amortization period for certain coal ash-related deferred expenses included in Adjustment #18. (*See* Tr. p. 326-11; pp. 1249-9, -10.) We agree with the parties that this is a reasonable amortization period.

ORS and DEP disagree on the appropriate amortization periods for deferred cost balances for costs incurred in connection with the development of proposed Units 2 and 3 of the Shearon

With respect to AMI, a 15-year amortization period is consistent with principles of cost causation and cost-benefit mirroring. Further, DEP witness Schneider testified that the service life of the AMI meters may actually be over 20 years. (Tr. p. 519, ll. 16-24.) This suggests that a 15-year amortization period is conservative and reasonably balances the Company's cash-flow needs with customer rate impacts.

The nature of the customer's interests were expressed at the Night Hearings. Based on that testimony, the Commission concludes there is a substantial risk that many low and fixed-income, elderly, and agricultural customers would be disproportionately and negatively impacted by DEP's full-requested increases. Longer amortization periods can provide a measure of rate mitigation. The Commission agrees with DEP witness Bateman that it must balance customer rate impacts and the Company's cash flow needs. Based on the totality of the Commission's decision in this Order with respect to the rates the Company will be allowed to charge, and with special reference to the Commission's reasoning with respect to ROE, the Commission is fully satisfied that the Company has excellent cash flow and ability to access capital. Accordingly, the Commission concludes that balancing cash flow with rate impacts also tends to support a longer amortization period.

For these reasons, the Commission finds that the amortization periods for Harris COLA shall be 8 years; SC AMI 15 years; and SC Grid 5 years. These periods are just and reasonable.

DEP's Position

According to DEP witness Bateman, the customer growth adjustment compares the average number of customers during the test period to the end of test period number of customers in order to annualize the impacts of customer growth to an end of test period level. (Rebuttal, p. 15, ll. 5-8). Witness Bateman testified that the amounts calculated by the Company and ORS for this adjustment are different based on other areas of disagreement, but each party agrees on the concept and the use of the method used to calculate this adjustment. (Rebuttal, p. 24, ll. 18-20).

Commission Finding

The Company and the ORS agree on the concept and use of the method used to calculate this adjustment. The ORS and Company amounts differ only due to the underlying adjustments of the ORS and the Company and the recommended ROE. The Commission agrees to a Customer Growth factor of 0.0267 percent in this proceeding.

AMI Report

Upon inquiry from this Commission, DEP witness Schneider agreed that the Company would be willing to provide an annual report to the Commission on quantifiable customer savings related to AMI meter deployment. (R. p. 504, ll. 16-25, p. 505, ll. 1-9).

Medical Opt-Out Tariff

Upon inquiry from this Commission, DEP witness Schneider agreed that the Company would look into whether it could offer a medical opt-out tariff to its South Carolina customers in the same way it offers one to its North Carolina customers. (R. p. 505, ll. 10-25 through p. 507, l. 3).

be amortized over a five-year period. These findings are just and reasonable and supported by the reliable, probative, and substantial evidence on the whole record and in the public interest.

5. We find DEP's requested revisions to its depreciation rates is just and reasonable and supported by the reliable, probative, and substantial evidence on the whole record and in the public interest.

6. We find the following to be just and reasonable based on the reliable, probative, and substantial evidence presented and in the public interest: BFC rates of $11.78 for residential customers; $12.34 for SGS customers; $11.31 for SGS Constant Load customers; and as to MGS and S&I customers, the Company should limit the increase to the BFC to be no greater than the average percentage increase of the SGS and SGS Constant Load customers.

7. We deny DEP's request to:

A. Reduce the differential between the declining block in the winter months for Schedule RES;

B. Reduce the differential between summer and winter demand rates for Schedule R-TOUD;

C. Reduce the differential between summer and winter demand rates for Schedule SGS-TOU;

D. Reduce the differential between on-peak and off-peak energy rates for Schedule SGS-TOU;

E. Increase the off-peak excess demand charge from $2.95/kilowatt ("kW") to $3.30/kW rather than the same percentage as other demand charges for Schedule SGS-TOU;

Advertising, and litigation expenses is just and reasonable and supported by the reliable, probative, and substantial evidence on the whole record and in the public interest.

A. DEP should not be allowed to recover $249,000 in expenses related to Other Employee Recognition and Rewards, Other Miscellaneous, and Lobbying and Advertising.

B. DEP should not be allowed to recover $390,000 in litigation expenses.

12. We find that ORS Adjustment #38 (ongoing payment obligation) is just and reasonable and supported by the reliable, probative, and substantial evidence on the whole record and in the public interest. The Commission accepts the ORS adjustment of ($0) and rejects the Company's proposal to incorporate the ongoing payment obligations to CertainTEED into the revenue requirement.

13. We find that it is appropriate, equitable, and consistent with regulatory principles to adopt a 75% disallowance of the $175,000 in South Carolina allocation of Duke Energy CEO Lynn Good's compensation, and a 50/50% disallowance of compensation of the next three highest-paid executives and otherwise accept the Company's Adjustments #22 and #29. We find that ORS Adjustment #30 (Customer Connect) removing $550,000 in inflation and contingency costs and declaring Order No. 2018-552 for deferred expenses related to Customer Connect null and void is just and reasonable and supported by the reliable, probative, and substantial evidence on the whole record and in the public interest. The Company shall be entitled to recover its actual 2018 Customer Connect O&M expenditure of $923,000.

14. We find that with respect to Adjustments # 17, #18, #19, #30, and #35, allowing the Company a WACC-return on deferred capital-related expenditures is just and reasonable and supported by the reliable, probative, and substantial evidence on the whole record and in the public

20. Establishment of an administrative docket to address this Commission's policy with respect to non-allowable expenses is just, reasonable, and in the public interest.

21. Establishment of an administrative docket to address this Commission's policy with respect to deferral accounting is just, reasonable, and in the public interest.

22. Requiring DEP to provide an annual report to this Commission regarding the salary, benefits, and bonuses paid to utility company officers and members of management, breaking down the specific amounts being charged to South Carolina customers and otherwise consistent with NASUCA Executive Compensation Resolution 2009-09 is just, reasonable, and in the public interest.

23. We find DEP shall provide the medical opt-out tariff that it currently offers to its North Carolina customers to its South Carolina customers.

24. We find that the Adjustments Stipulation entered into between the ORS and DEP and filed on April 17, 2019, is just, reasonable, and in the public interest, and is therefore adopted by this Commission as part of this Order and attached hereto as Order Appendix A.

VI. IT IS THEREFORE ORDERED THAT:

1. The calculation of the base rates required to generate approximately $41,474,000 revenue increase shall be established based on a 9.50% ROE and a capital structure that included 47% debt and 53% common equity.

2. DEP may recover $301,559,784 total, as it related to coal ash expenses, at this time.

3. The following BFC rates shall be implemented: $11.78 for residential customers, $12.34 for SGS customers, $11.31 for SGS Constant Load customers, and as to MGS and S&I

11. Revised tariffs shall be filed within 10 days of receipt of this Order, consistent with the Commission's Rules and Regulations. The tariffs should be electronically filed in a text searchable PDF format using the Commission's DMS System (https://dms.psc.sc.gov). An additional copy should be sent via email to etariff@psc.sc.gov to be included in the Commission's ETariff System (http://etariff.psc.sc.gov.) Future revisions should be made using the ETariff System. The tariffs shall be consistent with the findings of this Order and agreements with the other parties to this case. DEP shall provide a reconciliation of each tariff rate change approved as a result of this order to each tariff rate revision filed in the ETariff System. Such reconciliation shall include an explanation of any differences and be submitted separately from the Company's ETariff System filing.

12. DEP shall file a schedule showing the revenue produced by each and every tariffed rate approved by the Commission and reconcile the revenue produced, by tariffed rate, to the revenue requirement approved in this Order.

13. DEP shall provide an annual report to this Commission on quantifiable customer savings related to AMI meter deployment.

14. An administrative docket to address this Commission's policy with respect to non-allowable expenses shall be established.

15. An administrative docket to address this Commission's policy with respect to deferral accounting shall be established.

16. DEP shall provide an annual report to this Commission regarding the salary, benefits, and bonuses paid to utility company officers and members of management, breaking down the specific amounts being charged to South Carolina customers and otherwise consistent with NASUCA Executive Compensation Resolution 2009-09.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-318-E

In the Matter of:	)	
	)	
Application of Duke Energy Progress, LLC	)	**STIPULATION**
For Adjustments in Electric Rate Schedules	)	
and Tariffs and Request for an Accounting	)	
Order	)	

This Stipulation is made by and between the South Carolina Office of Regulatory Staff ("ORS") and Duke Energy Progress, LLC (the "Company") (together, the "Parties").

WHEREAS, on November 8, 2018, the Company filed an application in the above referenced proceeding proposing changes in its rates, charges, and tariffs for electric service to be effective on June 1, 2019 ("Application");

WHEREAS, in the Application and through testimony the Company has proposed numerous accounting adjustments to be adopted in this proceeding for ratemaking and reporting purposes;

WHEREAS, the ORS has reviewed the Company's proposed accounting adjustments and offered its own adjustments where it believed necessary and appropriate to do so in light of ORS's statutory mission, accounting principles, and previous decisions of the Public Service Commission of South Carolina;

WHEREAS, through joint efforts to resolve rate case issues in this proceeding, the Parties have reached agreement as to Adjustments 22 (Normalization of Storm Costs); 28 (Credit Card issues raised in this case. For invoice documentation, the Company will either submit paper invoices or the information requested below for electronic invoices consistent with the following:

a) Electronic invoice detail ~~in the format attached (Exhibit 1)~~

b) Confirmation of payment for the electronic invoice.

c) Affidavits from the vendor/counsel verifying that the amounts are related to this DEP rate case and are true and accurate.

d) ORS retains the right to spot check or sample rate case expenses, and request paper invoices or other supporting detail and Duke agrees it will obtain and provide from the vendor/counsel unless not available.

ORS reserves its right to challenge the inclusion of the unamortized rate case expense in rate base in the current and any future rate case proceeding.

5. The Parties agree that the Company may establish an end-of-life nuclear reserve fund as proposed in Adjustment #15. The Company shall adjust depreciation and amortization by $2,938,000, income taxes by ($733,000), working capital by ($2,938,000), and accumulated deferred taxes by $733,000 to adjust the reserve for end-of-life nuclear costs.

6. In compromise and settlement of Adjustment #15, the Parties agree to ORS Adjustment #39. Accordingly, the Parties agree to adjust nuclear materials and supplies inventory by ($599,000) to remove nuclear materials and supplies inventory at the Harris Nuclear Station that have remained in a hold status for a period greater than four years.

7. In compromise and settlement of Adjustment #15, the Parties agree to ORS Adjustment #21 to remove the inflation adjustment to non-labor O&M.

DUKE ENERGY PROGRESS, LLC

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-318-E - ORDER NO. 2019-454

OCTOBER 18, 2019

IN RE:	Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order	)	ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR REHEARING AND RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina ("Commission" or "PSC") upon the timely Petitions for Rehearing or Reconsideration filed pursuant to S.C. Code Ann. Sections 1-23-380 and 58-27-2150 and S.C. Code Ann. Regs. 103-825 (A)(4). Petitions to rehear or reconsider Commission Order No. 2019-341 ("Order") were filed by the South Carolina Energy Users Committee ("SCEUC"), the South Carolina Office of Regulatory Staff ("ORS"), and Duke Energy Progress, LLC ("Company," "DEP," or "Duke Energy"). The Commission finds that no rehearing of the evidence is necessary in this instance, but that, based upon a full review of the written arguments presented by the parties, in conjunction with a review of the record in this case, certain modifications to and clarifications of Order No. 2019-341 are warranted. This order sets out the Commission's changes to Order No. 2019-341, and to the extent that any rulings within this order conflict with Order No. 2019-341, this order supersedes the prior order. Any matters not specifically addressed in this order remain unchanged. Our holdings herein and the holdings contained in Order No. 2019-341 which remain unchanged are all supported by the entire record of this case.

Company's marginal cost to generate an additional kWh. (Tr. p. 709-21 – 709-23.) See Wheeler Rebuttal at pages 21-23. For these reasons, the Commission declines to require the Company to alter or amend its RTP tariff program at this time.

Petition of the Office of Regulatory Staff

The ORS made several requests for clarification from Order No. 2019-341. The issues were not necessarily contested matters, but rather, ORS sought specific enumeration of values for certain elements of the Company's Application. Those clarifications are as follows:

1. We clarify that the rate base is $1,477,356,000, and the net income for return is $103,271,000.

2. We clarify that the Company, for purposes of this rate case, is to use the Cost of Service Study presented by the Company to allocate all revenues, expenses, and rate base items and to design rates for all customer classes, unless otherwise specified by the Commission.

3. We clarify that the Commission intended to order a 75% disallowance of the $351,000 of Lynn Good's executive compensation allocated to South Carolina ratepayers – a net allowance of $88,000, rounded, with all attendant adjustments as recommended by the ORS in its petition.

4. We clarify that the Commission disallows the $178,000 of non-allowable expenses remaining in dispute.

5. We correct a clerical error. The Company's accounting Order No. 2018-553, not Order No. 2018-552 should be, and is, declared null and void.

Court has also made it clear that due process is flexible and calls for such procedural protections as the situation requires. *Kurschner v. City of Camden Planning Dep't*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008). The ORS has not demonstrated such prejudice here. Put most simply, due process in this case does not require that the proposed rates stated in the Company's initial application foreclose adjustment of component elements of its proposed charges in response to customer concerns. In this case, all the stakeholders had adequate notice of the additional revenue the Company was requesting, since the revenue request contained in the initial notice exceeded the actual revenue awarded.

In this docket, eleven parties intervened, including influential advocacy groups like the S.C. State Conference of the National Association for the Advancement of Colored People ("NAACP"), Upstate Forever, the Sierra Club, and the South Carolina Coastal Conservation League. Many of these groups participated in this proceeding in a representative capacity, advocating for customers. These groups brought substantial expertise to the proceeding and offered expert testimony on the issue of the proposed BFC. These experts clearly and unmistakably understood the inverse relationship between the reduction in the BFC they were advocating and an increase in the volumetric component of the Company's proposed rates. It is significant that none of these parties has joined the ORS in its concern about the purported problem with the notice provided in the proceeding. Additionally, hundreds of customers filed letters of protest with the Commission, and hundreds more attended the two public night hearings held in Sumter and Florence. We find that the level of participation in the case by both the intervenors and by individual customers demonstrates that the notice given of the requested rate increase was sufficient to meet the immaterial amount of budget funding to pay for video equipment to scope the pipe that later failed. (R. p. 1004-34, 11. 11-14). Duke Energy engineers were denied their request. (R. p. 1004-34, ll. 14-15). In response to the Dan River spill, the North Carolina Legislature passed CAMA that required the closure of existing coal ash ponds as well as conversion from wet ash to dry ash handling. (R. p. 1004-34, 11. 17-20).

ORS witness Witliff testified that Duke Energy Carolinas, LLC ("DEC") and DEP were criminally and civilly negligent in their operations and maintenance of the impoundments for years prior to the enactment of CAMA, confirming that DEC and DEP failed to responsibly address and correct these issues adequately -- and consequently in a much less costly -- manner than it is currently being required to do. (R. p. 1115-16, ll. 16-22). DEC's State President for South Carolina, Kodwo Ghartey-Tagoe, acknowledged in his testimony that in 2015, the Company pled guilty to violations of the Clean Water Act and its regulations as part of the criminal investigation following the Dan River spill. (Tr., p. 378). Duke Energy management made specific decisions that resulted in the coal ash spill in North Carolina, that in turn, led to the creation of CAMA. (R. p, 1004-38, 11. 32-33). North Carolina's CAMA is significantly more restrictive and stringent than the federal CCR Rule. (R. p. 1115-21, 11. 21-22).

Additionally, witness Wittliff testified that North Carolina's CAMA rules resulted in additional expenses being incurred at DEP's Asheville and Sutton plants, due to a more accelerated closure schedule than the federal CCR rule would have otherwise required. (R. p. 1115- 23, 11. 4-120). Regarding costs incurred at the DEP plant H.F. Lee, witness Wittliff testified that DEP's beneficiation project at H.F. Lee falls under the "CAMA-only"

North Carolina Renewable Portfolio Standards, and the North Carolina Competitive Energy Solutions for NC (HB.589) laws. (R. p. 1101-9, 11. 1- 5). Finally, the South Carolina General Assembly has not passed legislation that is similar to North Carolina's CAMA. (R. p. 1115-21, l. 8-9).

"The party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record." *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 105, 109 (2004). "Because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). Although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the South Carolina Supreme Court has concluded that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992) (internal citations omitted). However, that presumption is not dispositive; the burden remains on the utility to demonstrate the reasonableness of its costs, and the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011). "The ultimate burden of showing every reasonable effort to minimize [] costs remain on the utility." *See Hamm*, 309 S.C. at 286, 422 S.E.2d at 113. Additionally, substantial evidence on the whole record, which overcame the initial presumption of reasonableness, in determining it would be unreasonable for South Carolina customers to bear these Coal Ash Disposal costs.

The Company alleges that the Commission's Order results in an unconstitutional taking. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. However, no such taking occurred here, because the Company had no property right to recovery of coal ash disposal costs. The Commission is empowered by the General Assembly to set rates, and its determination of which expenses are recoverable is a component of its ratemaking authority. Duke has cited no legal authority restricting the discretion of the Commission in determining the recoverability of the coal ash disposal expenses at issue. Because the Commission has this discretion, Duke Energy has no protected property interest in recovery of the expenses. In determining whether a protected property interest exists in the context of utility ratemaking, the focus must be on the degree of discretion given to the decisionmaker, not on the probability of the decision's outcome. *S.C. Elec. & Gas Co. v. Randall*, 333 F.Supp.3d 552, 571 (D.S.C. 2018).

The Company has also asserted that the Commission's Order violates the Commerce Clause of the United States Constitution. This is the first time the Company has raised this argument. In discussing Petitions for Reconsideration or Rehearing filed before it, the South Carolina Supreme Court stated, "[t]he purposes of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a

Kenwood Enters. Inc., 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel runs against the government only in certain limited situations. In these situations, the party claiming estoppel against the government "must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Id.* at 236-37, 692 S.E.2d at 506. "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." 28 Am. Jur. 2d Estoppel and Waiver 5 27 (2011). "The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." *S.C. Pub. Serv. Auth. v. Ocean Forest Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "The party asserting estoppel bears the burden of establishing all its elements." *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting *Estes v. Roper Temp. Servs.*, 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991)). "Absent even one element, estoppel will not lie against a government entity." *Id.* at 320, 659 S.E.2d at 267.

In this case, the Company cannot show that the Commission's disallowance of the coal ash disposal costs at issue meets any of the above-enumerated elements of estoppel. The Company itself removed certain costs attributable to CAMA and other North Carolina laws. The Company cannot now claim justifiable reliance that this Commission would allow recovery of the coal ash disposal costs. Additionally, the Commission has, in prior cases, removed from recovery costs incurred due to other states' laws that are over and above what South Carolina law requires. The Company also incorrectly claims that the Commission made factual errors. According to the South Carolina Supreme Court, "[t]he Commission they had no voice in, and allowing one jurisdiction's laws to impose these costs on another's ratepayers would be a departure from past Commission rulings and practice. As a result, the Commission's Order is not arbitrary or capricious, contains all required analysis and rests upon the substantial evidence in the whole record.

2. Treatment of Deferrals

The Company asserts that the Commission erred in denying a return during the deferral and/or amortization period for the expenses addressed in the following adjustments: GridSouth, Fukushima/Cyber Security (Adjustment #17), Environmental Costs (Adjustment #18), Advanced Metering Infrastructure (Adjustment #19), Customer Connect (Adjustment #30), and Grid Improvement Costs (Adjustment #35).

While the Commission previously approved the Company's requests for accounting orders to defer the expenses detailed in the Application, the Commission orders provide no guarantee to the Company for cost recovery, including a return on those expenses. ORS witness Payne testified that, per the National Association of Regulatory Utility Commissioners ("NARUC") Rate Case and Audit Manual, a company may recover prudently incurred operating expenses, without a weighted average cost of capital ("WACC") or rate base treatment.

The ORS position, which was adopted by this Commission, is that deferrals related to O&M expenses are not to earn a return, while those deferrals related to capital costs are to earn a return. Treatment of deferrals is ultimately a matter of the Commission's discretion. The Commission has a duty to balance the needs of the public and the utility such that the public is served without the utility being disserved. This approach represents exactly such a the two utilities presented the same expert witness, who proposed the same ROE for both, in spite of the dissimilarity of the two companies. This request is contrary to South Carolina law. DEP presented no evidence in this case to suggest that DEP and SCE&G were comparable in terms of risk such that they should be awarded the same ROE, nor could it. Indeed, DEP's own evidence suggested that its corporate parent had strong credit ratings and was financially sound, which contrasts markedly with the evidence produced in the SCE&G Consolidated Cases showing that SCE&G was at risk of bankruptcy. Moreover, the ultimate ROE awarded in the SCE&G Consolidated Cases was the result of a settlement, while this case was fully litigated. Because SCE&G and DEP did not have corresponding risks, it is logical that they would be awarded different ROEs.

Three (3) parties' witnesses pre-filed testimony that specifically addressed the issue of ROE. Robert Hevert testified on behalf of DEP, David Parcell for ORS, and Steven Chriss on behalf of Walmart. Mr. Hevert recommended a ROE for DEP of 10.75% within a range of 10.25% to 11.25%. In the Company's Application, DEP requested that the Commission approve a ROE of 10.5%. *See, Application of Duke Energy Progress, LLC*, Para. 24 (Nov. 8, 2018). This recommended range is clearly extraordinarily high and exceeds the afore-cited averages by approximately 100 basis points. The differential between the averages and Mr. Hevert's recommended ROE clearly supports the Commission giving greater weight to the testimonies of witnesses Parcell and Chriss.

Witness Parcell testified that DEP's ratings were generally higher than most electric utilities in the United States and that its ratings are indicative of relatively lower risk. (R. p, 801-18, ll. 6-10). DEP witness Sullivan testified that rating agencies believe that DEP with a 9.1% midpoint) and CE (range of 9.0% to 10.0% with a 9.5% midpoint) models. (R. p. 801-4, l. I). As a result of these analyses, Mr. Parcell recommended a Cost of Capital in the range of 6.73 to 6.94 %, with a midpoint of 6.84 %. (R. p. 801-4, 11. 8-9). In reaching his recommendation of a 9.3% ROE, Mr. Parcell in large part relied on the DCF model, which is an analysis of current market conditions. The DCF model relies on current stock prices in the marketplace and has traditionally been regarded by this Commission as the best indicator of the return investors require in the marketplace for investment-grade regulated utility companies. Mr. Parcell relied on the results of both his DCF and CE analyses to determine his ROE recommendation and did not include the results of his CAPM analysis, as he found that the resulting range (i.e., 6.3% to 6.6%) was too low to be practical (R. p. 801-45, 11. 18-21). Mr. Parcell thus further established the reasonableness of his recommended ROE. By excluding his CAPM analysis, Mr. Parcell evidenced an effort to produce a fair and reasonable recommendation to the Commission. Conversely, DEP witness Hevert recommended that both of his DCF analyses be given little weight by the Commission, apparently in large part due to them yielding results which he believed to be too low, and thus disadvantageous to the Company (R. p. 948-8, 11. 1-3).

The Commission also relied on Mr. Parcell's testimony which demonstrated that Mr. Hevert's analyses showed a consistent pattern of choosing data and methodologies that result in the highest possible Cost of Equity conclusions. As the Commission correctly pointed out in questioning the testimony of Mr. Hevert, the data used by Mr. Hevert was filtered to produce an inflated ROE recommendation to the benefit of the Company. The Commission additionally accepted Mr. Parcell's assertion that Mr. Hevert's use of several "factors" to substantial evidence in the record to support the Commission's assignment of a 9.5% ROE. Accordingly, we reject DEP's request for reconsideration of our ruling on this issue.

4. Coal Ash Litigation Expenses

The Company argues that it is entitled to a presumption of reasonableness of its expenditures, including litigation expenses. As a first step in the analysis and determination of cost recovery, the Company would be correct – however, that is not the end of the analysis.

> Utility is correct that it was entitled to a presumption that its expenditures were reasonable and incurred in good faith, and therefore, a showing that its expenses had increased since its last rate case could satisfy its burden of proof. Nevertheless, the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs.

Utils. Servs. of S.C., 392 S.C. at 109-10, 708 S.E.2d at 762-63 (citing *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286-287, 422 S.E.2d 110, 112-113 (1992)).

Here, based on the substantial evidence on the whole record, the Commission properly excluded from recovery the expenses incurred in the coal ash litigation. This Commission cannot presume that the expenses a utility seeks to recover in its rates and charges are legitimate if they cannot be subjected to the scrutiny of an audit or examination. Every rate received by an electric utility must be just and reasonable. S.C. Code Ann. §58-27-810 (2015). Here, the Commission concluded that it would be unreasonable to pass these coal ash litigation expenses on to the Company's customers absent more detailed information by way of which the Commission could determine with more certainty whether recovery of these expenses from the ratepayers would be just and reasonable. Accordingly, the Commission correctly found that the Company had failed to carry its burden.

contract for a much greater financial detriment to the Company – and ultimately – the ratepayers. (R. pp. 915-17). The net benefit under the CertainTEED contract to consumers was approximately $50 Million, derived by calculating: 1) approximately $12 million in customer costs avoided for stockpile management, 2) $116 million in landfill cost avoidance savings to customers, 3) $17 million in direct revenue benefit to customers, and 4) a net subtraction of approximately $92 million from liquidated damages under the contract and associated legal fees. (R. pp. 921-25). The resulting more than $50 million in savings to customers demonstrates to us that the decision to enter into litigation and settlement with CertainTEED was strategic, reasonable, and prudent. Therefore, the costs incident to the CertainTEED litigation, an adjustment of approximately $830,000, are recoverable.

Conclusion

IT IS THEREFORE ORDERED:

1. The Commission declines to rehear or reconsider the two issues raised in the SCEUC Petition.

2. Clarification is provided for eight (8) matters raised by the Office of Regulatory Staff.

3. Satisfactory notice was issued to satisfy due process concerns regarding the proceeding in this docket.

4. Reconsideration or rehearing is denied in regard to coal ash remediation and disposal costs; treatment of deferrals; return on equity; and coal ash litigation expenses.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Public Service Commission Docket No. 2018-318-E

Duke Energy Progress, LLC, Appellant-Respondent,

v.

Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc.,

Respondents,

Of whom Office of Regulatory Staff is Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent-Appellant Notice of Appeal on the following parties on this 20th day of November, 2019, by mailing a copy of the same via United States Mail, postage prepaid, to the following:

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